Supreme Court, U.S.
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NO. 90-1926

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

RICHARD JOSEPH BUCCINI,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After determining that there were material omissions in the affidavit for the search warrant under Franks v. Delaware, did the Arizona Supreme Court correctly determine that, under the fourth amendment, the state was required to investigate all possible leads and witnesses prior to seeking a search warrant, and that the failure to affirmatively show this investigative evidence in the affidavit rendered the warrant lacking in probable cause?

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OPINION BELOW

A divided Arizona Supreme Court vacated a lower appellate court opinion and suppressed the state's evidence obtained pursuant to a search warrant. The court held that the trial court's implicit finding that the detective recklessly omitted facts about the suspect's alibi and desire to terminate a consent search warranted a redrafting of the affidavit. After the court redrafted the affidavit, the court found that there was insufficient probable cause to support the issuance of the warrant because the state failed to investigate all of the leads given by the defendant. The opinion is appended here as Appendix A.

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court, which the state asks this Court to review, was filed on April 18, 1990. (Appendix A.) No motion for reconsideration was filed. This petition is filed within 90 days from the date of the opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

During the investigation of a bombing, Tucson police Detective Kadous, an explosives expert, obtained a telephonic search warrant from superior court Judge Meehan by giving him the following information:

> On May 8 at 0300 hours a pipe bomb was placed in the garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victims' vehicle. Also attached to the car window was a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at his residence. He invited me in and I interviewed [sic] him regarding this incident. He stated that he was on probation [sic] at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident. He also stated that he was out around at night at the time of the bombing and did not do

> it but did not have any other people to provide an alibi where he was at. I asked him if he would sign a consent to search form which he did at 1230 hours.
>
> During the search I found gun powder, safety fuse and green cannon fuse which was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he received some military paraphernalias [sic] from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in which he was found in possession of military ordinance [sic] and explosives. Those were also confiscated. While searching the residence Mr. Buccini was definitely in a hurry and was inferring [sic] that I leave the residence so that he could go to work at 1400 hours. The search was concluded and the items aforementioned were seized. A complete search was not done of the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

There was an evidentiary hearing at which the detective and the defendant testified.

The trial court made the following findings:

> THE COURT FINDS that the statement in the affidavit that the defendant "did not have any other people to provide an alibi where he was at. [sic]" is false. THE COURT FURTHER FINDS that the affidavit should have included information that the officer had at the time which was that defendant had stated he was at the "Harp and Shamrock Bar" during part of the time in question and that he had listed alibi witnesses including Dwayne Nanna, among others. Furthermore, the officer should have listed that the defendant had, at approximately 12:30, gone to his parents' home and that his father and sister had noted his presence in the residence at that time.
>
> THE COURT FURTHER FINDS that with the deletion of the false statement and the inclusion of the alibi statements, that the Judge would have been prompted to inquire further of the police officer as to his investigative efforts with regard to verifying that the presence of the defendant with the alibi witnesses.
>
> THE COURT FURTHER FINDS that the inclusion of the implication that the defendant was rushing the police officer in his search was incorrect. Rather, the officer should have included a statement that the defendant was, in fact, cooperating with the officer

throughout the voluntary search, and that it was the officer who concluded the search based on his own knowledge that the defendant had to go to work that day.

Accordingly, THE COURT FINDS the remaining affidavit is insufficient to show probable cause and

IT IS ORDERED suppressing all fruits of the illegal search.

Relying on the trial court's findings, the Arizona Supreme Court redrafted the affidavit to read as follows before finding that it failed to establish probable cause to search:

On May 8 at 0030 hours a pipe bomb was placed in the garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victim's vehicle. Also attached to the car window was a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at

his residence. He invited me in and I interviewed him regarding this incident. He stated that he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident. ~~He also stated that he was out around at night at the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at.~~ He stated that he was at the Harp and Shamrock Bar on the night of the bombing, and named witnesses who could verify this, including Dwayne Nanna, among others. He also stated that he went to his parents' home at approximately 12:30 and that his father and sister had noted his presence in the residence at that time. I asked him if he would sign a consent to search form which he did at 1230 hours.

During the search I found gun powder, safety fuse and green cannon fuse which was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he received some military paraphernalia and explosives from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in

> which he was found in possession of military ordnance and explosives. Those were also confiscated. ~~While searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at 1400 hours. The search was concluded and the items aforementioned were seized.~~ Buccini was cooperative throughout the search. I concluded the search because I knew that Buccini had to go to work at 1400 hours. The aforementioned items were seized. A complete search was not done on the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

(Appendix C at A-53-54.) The Arizona Supreme Court found that, because the defendant had given explanations for the presence of the explosive material and a list of alibi witnesses not investigated by the police, there was no probable cause. (Appendix at A 31-34.)

REASONS FOR GRANTING THE WRIT

In Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), this Court held that a defendant could challenge false statements made in an affidavit supporting a search warrant. This Court instructed that no hearing was required if, after the alleged falsity or reckless disregard in the affidavit was set aside, there remained sufficient content in the affidavit to support a finding of probable cause. 438 U.S. at 164.[1]

Although Franks was concerned with a false statement made in an affidavit, courts have extended the Franks reasoning to material omissions from affidavits.

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1. In this case, there was a hearing on the affidavit during which Buccini and the police officer testified. Arizona does not at this point dispute the factual findings of the trial court regarding the falsity or the recklessness of the statements contained in the affidavit.

W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 4.4(b), at 194 (2d ed. 1987). See, generally, Annot., Disputation of Truth of Matters Stated in Affidavit in Support of Search Warrant - Modern Cases, 24 A.L.R. 4th 1266 (1983). Generally, courts do as the Arizona Supreme Court did in this case, they add the omitted material facts to the affidavit and then determine if the redrafted affidavit contains sufficient facts for probable cause to search. (Id.) What the courts do not agree on is what standard governs this determination. Compare: People v. Sundermeyer, 769 P.2d 499 (Colo. 1989) (the test for determining whether an omission in an affidavit invalidates a search warrant is whether the omitted facts rendered the affidavit substantially misleading to the judge who issued the warrant); State v. Beaty, 118 Idaho 20, 794 P.2d 290 (1990) (courts

must determine whether there is a substantial probability that, had the omitted information been given to the magistrate, it would have altered the latter's determination of probable cause, rather than whether the magistrate was misled by such omission.)

The Arizona Supreme Court's decision in this case shows the confusion over what standard should apply. On de novo review, the majority opinion focused on the effect the information might have had on the magistrate. (Appendix A at A-22.) The dissent on the other hand focused on whether the affidavit still contained probable cause after redrafting. The majority reasoned that, had more information been presented in the affidavit, "...the magistrate would have been prompted to inquire whether Kadous [the police officer] had attempted to verify the alibi [defense proffered by Buccini]." (Appendix A at A-32.) The

majority's approach is not supported by fourth amendment jurisprudence.

The majority and the concurring opinions incorrectly focus on what they believe the affiant police officer should have done, rather than evaluating the evidence actually presented. The court found under the fourth amendment that the officer should have completed his investigation before he applied for the warrant. For example, the concurring justice states: "The officer should have proceeded to investigate the matter to the point that he either found probable cause or excluded defendant as a suspect." (Appendix A at A-41). Likewise, in footnote 8 of the majority opinion, the court holds: "It [the alibi] might have been disproved by police investigation, but supplying misinformation to the magistrate does not qualify as investigation." (Appendix A at A-27.) Again stressing concern over

how the officer investigated his case, the majority says: "...the affidavit provides no facts indicating the alibi to be untrue or possibly untrue." (Appendix A at A-32.)

This Court and other federal courts have warned against making applications for search warrants so cumbersome a procedure inimical to effective law enforcement that they have the opposite effect of discouraging police from applying for warrants. United States v. Davis, 617 F.2d 677 (D.C. App. 1979) (citing United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)); see also, Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1982). This concern has caused the Fourth Circuit to hold that omissions from affidavits are not subject to the same high level of scrutiny as misstatements in an affidavit. United States v. Colkley, 899 F.2d 297 (4th Cir.

1990); United States v. Rivera, 750 F. Supp. 614 (S.D.N.Y. 1990). In rejecting a rule that would have required affiants to disclose exculpatory information in the manner now mandated by the Arizona Supreme Court, the Fourth Circuit concluded that, because the consequences of arrest or search are less severe than the consequences of an adverse criminal verdict, a duty to disclose potentially exculpatory information, appropriate in the setting of a trial, is less compelling in the context of an application for a warrant. 899 F. 2d at 302. Put another way, in looking at probable cause, the magistrate is not deciding the guilt or innocence of the defendant. Gates, 462 U.S. at 245 n. 13, 103 S. Ct. at 2335 n. 13, 76 L. Ed. 2d at 535 n. 13. (in making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty,

but the degree of suspicion that attaches to particular types of noncriminal acts). The end sought by the Franks motion is the suppression of evidence through the application of the exclusionary rule as a sanction against the officers for an alleged fourth amendment violation. If the motion is denied, however, the defendant will still be judged by the truth of the state's case. To mandate that potentially exculpatory evidence must accompany an affidavit opens officers to endless conjecture about investigative leads, fragments of information, or other matters that might, if included, have redounded to defendant's benefit. Colkley, 899 F.2d at 301.

Even before Franks, courts rejected the notion that police were required to include contradictory information in the affidavit. Id. State v. Williams, 169 Conn. 322, 363 A.2d 72 (1975).

Essentially, to litigate a claim that exculpatory information was excluded from the affidavit is nothing more than an attempt to proffer a defense of alibi before trial. As alibi evidence is merely a rebuttal of the state's evidence, such a claim is properly left to plenary trial, where the issue becomes one of credibility to be determined upon the whole evidence by the trier of fact. 363 A.2d at 76-77. That is particularly true where the alibi defense will rest on the testimony of interested parties like family members or friends.[2] Other courts have noted that, rather than suggesting impossibility, these "I didn't do it" type of alibis are usually too weak to even require a Franks hearing.

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2. At the hearing, Buccini did not present affidavits from so-called alibi witnesses, nor did he call them. The evidence in this case was suppressed solely on the testimony of the defendant and the police officer that Buccini had given the officer a list of alibi witnesses.

People v. Castro, 190 Ill. App. 227, 137 Ill. Dec. 717, 546 N.E.2d 662 (1989), app. den., 129 Ill. 2d 566, 140 Ill Dec. 675, 550 N.E.2d 560 (1990).

Under the Arizona Supreme Court's overly broad reading of Franks any suspect can stop an investigation dead in its tracks by handing the police a list of alibi witnesses to be checked out. The officer in this case was trying to secure the evidence in Buccini's control before it could be destroyed or hidden. At that time, Buccini knew he was the prime suspect. Requiring the detective to first speak with Buccini's drinking companions and family members about an alleged alibi would have defeated the purpose of the warrant.

Only the probability, not a prima facie showing of criminal activity, is the standard of probable cause. Gates, 462 U.S. at 233, 103 S. Ct. at 2330, 76 L. Ed 2d at 540. Arizona submits that

the redrafted affidavit still contains facts that justify a reasonably prudent person to conclude that the ordnance items sought were connected with criminal activity and could be found in Buccini's residence or vehicle. Buccini had a motive, a grudge against the victim over the reporting of an automobile accident that matched perfectly the "drop it" note left on the victim's damaged vehicle. Buccini was admittedly out drinking the night of the bombing. He had in his home various ordnance, including the same kind of fuse as that used in the pipe bomb. He had experimented with explosives before and had ties to illegally possessed military explosives. A cooperative suspect and an alleged alibi defense do not detract from this information. The alibi claims are matters for the jurors at trial. The redrafted warrant on its face supports a finding of probable cause to search.

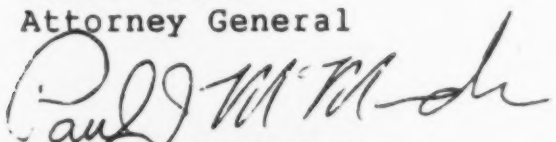
CONCLUSION

This Court should accept this case and hold that the test to be applied when a suspect challenges a search warrant affidavit on the ground that the affiant omitted material information is whether the remaining evidence supports a finding of probable cause. This Court should also hold that potentially exculpatory leads or witnesses need not be investigated prior to the state's seeking a warrant. The Arizona Supreme Court's opinion should be vacated and the case remanded for trial.

DATED this 6TH day of June, 1991.

Respectfully submitted,

GRANT WOODS
Attorney General



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CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 6TH day of June, 1991, to:

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APPENDIX

[Filed Apr. 18, 1991]

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

State of Arizona,	) Supreme Court
	) No. CR-90-0124-PR
Appellee,	)
vs.	) Court of Appeals
	) No. 2 CA-CR 89-0215
RICHARD JOSEPH BUCCINI,	)
	) Pima County
Appellant.	) No. CR-24658
	)
	) O P I N I O N

Appeal from the Superior Court of

Pima County

The Honorable Lina S. Rodriguez, Judge

AFFIRMED

Opinion of the Court of Appeals,
Division One, 165 Ariz. 108,
796 P.2d 910 (Ct. App. 1990)
vacated

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FELDMAN, Vice Chief Justice

Richard Buccini petitioned for review, asserting that the court of appeals erred in reversing a superior court order suppressing evidence seized on a search warrant. State v. Buccini, 165 Ariz. 108, 796 P.2d 910 (Ct. App. 1990). We granted review to clarify the appropriate standard to be used by an appellate court in reviewing the sufficiency of a redrafted search warrant affidavit under the procedure established in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). See Rule 31.19, Ariz.R.Crim.P., 17 A.R.S. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. § 12-120.24.

FACTS AND PROCEDURAL HISTORY

Shortly after midnight on May 8, 1988, a pipe bomb exploded in the carport of Howard Moore's Tucson home. Although Moore heard a loud explosion, he did not realize that his property had been

damaged until the following morning. Moore then telephoned the police, and Officer Karn was dispatched to Moore's home to secure the area and make a report.[1] The bomb damaged the carport and Moore's automobile. Moore called Karn's attention to a note that read "drop it," which was stuck to the car window on the driver's door.

Karn asked Moore who could have been responsible. Moore replied that he had been involved in a minor traffic accident six weeks earlier with a van owned by Canyon Ranch. The driver of the van, Richard Buccini, apologized and offered to pay for the damage himself. He asked Moore not to report the accident to the police, as he was afraid that a citation would jeopardize his job. However, a bystander had already called the police.

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[1]The following facts are taken from the State's Opposition to Motion to Suppress, Exhibit C, Officer Karn's Report.

When the police arrived, Buccini claimed that Moore was partially at fault. The officer wrote a report on the accident but did not cite Buccini or Moore. Moore told Karn that his own insurance company had paid him for the damage but planned to ask for reimbursement from Canyon Ranch. Moore did not say that Buccini knew this or that he had lost his job as a result of the incident, nor did he report any further contact with Buccini. Moore also told Karn that the threat might relate to his position as president of the Veterinarian Association because it was part of his job to investigate claims against veterinarians. Moore could not, however, identify any particular situations that could relate to this threat.

Karn then called the Bomb Unit at the Tucson Police Department, and Detectives Kadous and Weadock responded. Kadous and Weadock spoke with Moore, photographed

the scene, and collected the evidence, while Karn interviewed the surrounding neighbors. Several neighbors had heard the noise of the explosion. Most estimated that it had occurred between 12:00 and 12:30 the previous night. One neighbor stated that the noise had occurred at 11:56 p.m. and that he had been alarmed and immediately 911. Karn's report includes the fact that the call was made, along with its documenting number.

At about noon on May 12, 1988, Kadous went to Buccini's apartment to interview him. Kadous was aware only that Buccini and Moore had been involved in an automobile accident in March and that Moore could not think of anyone but Buccini who could have had a reason to threaten him. At the time of the interview, Kadous was apparently still uncertain about the exact time of the bombing, although he had spoken with Karn

and possibly read her report disclosing the existence of the 911 call at 11:56. (Transcript of Hearing on Motion to Suppress -- Kadous' statement (HT).)

Buccini was cooperative when Kadous approached him, and invited him in. Kadous conducted a "pretape interview," the content of which is disputed, and a taped interview. It is undisputed that Buccini denied having any involvement in the bombing and stated that he was at the Harp and Shamrock Bar until between 12:00 and 12:30 that night, giving the names of at least two witnesses who could verify this. (HT at 26.) Buccini then stated that after he left the bar, he went to his parents' house, where he had a sandwich and spoke with his sister and father. He left his parents' house at approximately 1:00 a.m. and went home.

After telling Kadous about the events of May 8, Buccini signed a form giving Kadous consent to search his apartment.

During the search, Kadous found gun powder and certain types of fuses. Buccini explained that he was formerly an employee of Jensen's Custom Ammunition and that he had a hobby of reloading ammunition. Buccini also mentioned, apparently even before the search, that he had used cannon fuse obtained at Jensen's to try to detonate bleach and mothballs, and that he and a friend, Carl Weisel, at one time used to go out to dirt caves and set off grenade simulators.

Buccini was still employed at Canyon Ranch and had to be at work at 2:00 p.m. that day, so the search terminated after Kadous took possession of the gun powder and fuses. Kadous admits that Buccini was completely cooperative and even assisted Kadous as he searched. (HT at 44.)

Following the consent search and Buccini's departure for work, Kadous made a telephonic request for a search

warrant.[2] He sought to search Buccini's apartment and car for any "materials," "tools," or "equipment" that could be used to "construct an explosive device." Kadous described the March car accident and the May bombing incident. He explained that he had interviewed Buccini and that Buccini told him "he was out around at night at the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at." He said that Buccini had consented to a search, during which he discovered the fuses and gunpowder. He concluded that "while searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at

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[2]Under A.R.S. § 13-3914(C), a magistrate may take the affiant's oral statement under oath by telephone. This statement is recorded and deemed to be an affidavit for purpose of issuance of a search warrant.

1400 hours." He stressed that a complete search had not been done and that he believed that evidence would be concealed or destroyed if the residence was not searched immediately.[3]

A superior court judge, sitting as a magistrate (see A.R.S. § 1-215(13)), issued the search warrant, and Kadous conducted a search of Buccini's apartment and car, which yielded several items of evidence. Following Detective Kadous' testimony before a Pima County grand jury, Buccini was indicted on several counts.

Buccini filed a motion to suppress the evidence seized pursuant to the search warrant on the ground that Kadous omitted or misrepresented material facts in the affidavit. Specifically, Buccini claimed the affidavit omitted material facts as

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[3]The relevant text of the search warrant affidavit is set forth in Appendix A to this opinion.

to Buccini's alibi, falsely stated there were no alibi witnesses, and falsely implied that Buccini attempted to terminate the search before all the evidence was uncovered, thus giving Kadous reason to think that Buccini would later conceal or destroy evidence. Buccini claimed that if Kadous had not made these material omissions and misrepresentations, the magistrate would not have found probable cause to issue the search warrant.

The trial court ordered an evidentiary hearing on the motion to suppress. Buccini and Kadous testified extensively at the hearing. At the conclusion of the testimony, the trial court granted the motion to suppress. The trial judge found that Kadous falsely stated in the affidavit that Buccini did not have anyone to confirm his alibi. The trial judge also found that the affidavit omitted the information about where

Buccini claimed to have been on the night of the bombing and the names of his alibi witnesses. The judge believed that including this additional information would have prompted the magistrate issuing the warrant to inquire whether Kadous had attempted to verify the alibi. The trial judge also found that the affidavit falsely implied that Buccini was uncooperative. Instead, the affidavit should have included the truthful statement that Buccini was cooperative throughout the investigation. The judge concluded that once the false information was eliminated and the omitted material information added, the affidavit was insufficient to show probable cause.[4]

Upon the state's motion, the case was dismissed without prejudice. The state then appealed from the suppression order

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[4]The trial court's order is set forth in Appendix B to this opinion.

(see A.R.S. § 13-4032(7)), alleging that the trial court used an incorrect standard to judge the contents of the affidavit and therefore abused its discretion in suppressing the evidence.

The court of appeals correctly noted that a defendant may challenge the veracity of factual statements contained in an affidavit supporting the issuance of a warrant. Buccini, 165 Ariz. at 110, 796 P.d at 912 (citing Franks, 438 U.S. 154, 98 S.Ct. 2674). Applying Franks' two-pronged test, the court first assumed, without deciding, that Buccini had proved the existence of a falsehood made with the requisite mental state, i.e., with knowledge, intent, or reckless disregard. Turning to Franks second prong, the court held that even after the affidavit was redrafted to exclude the false information and include the omitted material information, "it is clear that probable cause existed to believe that

these items would be found in Buccini's apartment and automobile." Id. Concluding, therefore, that the trial court had abused its discretion, the court vacated the suppression order and remanded the case. Id. at 111, 796 P.2d at 913.

Buccini then petitioned for review, asserting that the court of appeals erred in disregarding the findings of the trial court judge, which were based on her assessment of the "facts and witness credibility," and improperly substituted its own judgment on the facts to find that the search warrant was supported by probable cause.

DISCUSSION

A. The Parties Assert that Abuse of Discretion Standard Applies

Buccini argues that a trial court's ruling on a motion to suppress must be upheld absent an abuse of discretion, and that its findings of fact underlying the motion to suppress must be accepted

unless clearly erroneous. Petition for Review (PR) at 14-15. According to Buccini, the trial court's finding that the redrafted search warrant did not establish probable cause was essentially a factually determination. PR at 14. Thus, the court of appeals erred in redrafting the affidavit and then reversing "the factual determinations of the trial judge in determining probable cause." PR at 14.

Agreeing that the appropriate inquiry is whether the trial court abused its discretion, the state claims, first, that the trial court did not find that Kadous intentionally, knowingly, or recklessly lied to the magistrate. Opposition to PR at 5-6. Second, even if such falsehoods are assumed to exist and deleted from the affidavit, the redrafted affidavit contains facts that show probable cause.

B. Review of a Trial Court's Findings at a Franks Hearing

1. Allegations Pertaining to Falsity of Averments

In Franks, the Supreme Court held that a defendant is entitled to a hearing to challenge a search warrant affidavit when he shows (1) that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit, and (2) the false statement was necessary to the finding of probable cause. 438 U.S. at 155-56, 98 S.Ct. at 2676. The defendant must establish the first prong of the test by a preponderance of the evidence before the court may set the false material aside and view the affidavit's remaining content to see whether it is sufficient to establish probable cause. Id. at 156, 98 S.Ct. at 2676. If the affidavit is then insufficient to establish probable cause, "the search warrant must be voided and

the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id.

2. Nature of the Falsehood

This court has followed Franks when considering challenges as to the truthfulness of factual statements in a search warrant affidavit. State v. Carter, 145 Ariz. 101, 108, 700 P.2d 488, 495 (1985); State v. Poland, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982). In Carter, we also held that where the falsehoods or omissions were deliberate or reckless, the court must redraft the affidavit by deleting the falsehoods and adding the omitted material facts before moving on to the probable cause determination. 145 Ariz. at 109, 700 P.2d at 496. The trial judge in this case clearly redrafted the affidavit in accordance with Franks and Carter, and also, we assume, followed the law in

determining that the misstatements and omissions of material fact were made with the requisite state of mind, before finding the remaining facts insufficient to establish probable cause.[5]

On appeal, different standards are used to review the trial court's findings as to whether the affiant included a knowing, intentional, or reckless misstatement of fact and whether the redrafted affidavit establishes probable cause. A trial court's finding on whether the affiant deliberately included misstatements of law or excluded material

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[5] The judge's order did not explicitly state that the false averments were made knowingly, intentionally, or recklessly but, given that the affiant both knew the correct facts while swearing to false facts and omitted other facts that he knew, the conclusion seems inescapable. Also, there is no other explanation for the judge's ruling under Franks' second prong. Franks was thoroughly discussed at argument and explicitly addressed by the trial judge. HT at 3-7. In suppressing under Franks' second prong, the trial judge necessarily considered and resolved the issues under the first.

facts is a factual determination, upheld unless "clearly erroneous." United States v. Fawole, 785 F.2d 1141, 1145 (4th Cir. 1986); United States v. Elliott, 893 F.2d 220, 222 (9th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 268 (1990); United States v. Dozier, 844 F.2d 701, 705 (9th Cir.), cert. denied, 488 U.S. 927, 109 S.Ct. 312 (1988); United States v. Jenkins, 901 F.2d 1075, 1079 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 259 (1990). This standard is consistent with the general body of law holding review for clear error appropriate where the applicable legal standard provides for a strictly factual test, such as state of mind. See United States v. McConney, 728 F.2d 1195, 1203 (9th Cir.), cert. denied, 469 U.S. 824, 105 S.Ct. 101 (1984).

In this case, as Buccini notes, the trial judge was in a unique position to judge Kadous' credibility and determine

that he was on notice of material facts that he either misstated or omitted entirely from the affidavit. The Court in Franks stressed that the showing for probable cause must be "truthful, in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165, 98 S.Ct. at 2681. It is clear that Buccini told Kadous of his alibi and named several alibi witnesses. The evidence at the hearing also showed that Kadous knew Buccini was still employed at Canyon Ranch and knew that he had to be at work that day. Therefore, the evidence supports the trial judge's implicit finding that Kadous at least recklessly[6]

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[6] It was not necessary for the trial court to determine which of the three mental states Kadous possessed. Under the case law that preceded Franks, a misstatement by a government officer in the affidavit made with intent to deceive the magistrate was held to void the warrant altogether. 2 W. (continued)

misstated material facts by swearing under oath that Buccini did not have anyone to substantiate his alibi, and by inferring that Buccini was hurrying Kadous in order to prevent him from discovering further evidence. We cannot conclude, therefore, that the trial judge committed clear error or abused her discretion in making this finding. Cf. State v. Claxton, 122 Ariz. 246, 248, 594 P.2d 112, 114 (Ct. App. 1979) (officer's statement in the affidavit that defendant was in possession of merchandise was

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(continued)
LA FAVE, SEARCH & SEIZURE § 4.4, at 198 (2d ed. 1987). This is still the law in some jurisdictions. See, e.g., State v. Malkin, 722 P.2d 943 (Alaska 1986). However, most jurisdictions adhere to the position set forth in Franks that intentional and reckless falsehoods have an identical effect and do not provide grounds for voiding the warrant unless, after their deletion, the warrant does not establish probable cause. 2 W. LA FAVE, supra, § 4.4, at 199. As La Fave notes, this rule makes it unnecessary for trial judges to make the "difficult finding of whether a particular misrepresentation was intentional instead of reckless." Id.

found to be "knowingly and intentionally false" or "made with reckless disregard for the truth" where officer admitted at hearing that there was, at best, "only a possibility that jewelry was back in [defendant's] possession").

We conclude that the trial judge was correct in following the first prong of Franks and redrafting the search warrant affidavit to exclude the material misstatements and include the relevant omitted facts. We must now determine whether the redrafted search warrant was sufficient to establish probable cause.[7]

3. The Probable Cause Issue

The court of appeals apparently reviewed the trial court's probable cause determination under an abuse of discretion standard. Buccini, 165 Ariz.

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[7] The search warrant affidavit, redrafted in strict accordance with the trial judge's factual findings, is set forth in Appendix C to this opinion.

at 110, 796 P.2d at 912. Although this court has never expressly considered this issue, we believe that de novo review is the proper standard to review a trial court's finding as to whether a redrafted search warrant affidavit is sufficient to establish probable cause. See, e.g., Elliott, 893 F.2d at 222; Dozier, 844 F.2d at 705; United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir.), cert. denied sub nom Brown v. United States, 484 U.S. 837, 108 S.Ct. 119 (1987); see also McConney, 728 F.2d at 1203 (noting that the United States Supreme Court has held that the mixed question of probable cause is treated as a question of law and reviewed de novo).

Although in most instances a magistrate's finding that sufficient probable cause exists to issue a search warrant will not be overturned unless it is clearly erroneous, this rule does not apply when a trial court reviews an

affidavit that was submitted to the magistrate and later found to have been supported by false statements. Elliott, 893 F.2d at 222. Under these circumstances, the trial court must undertake an independent review of the effect of the false statements on probable cause because "the question turns on the consequences of a fraud on the issuing magistrate which that magistrate was not in a position to evaluate." Id. Because the magistrate's discretion was vitiated by fraud, the question turns on the legal effect of the correct facts. De novo review of the trial court's finding as to the existence of probable cause is therefore appropriate. Id.

Moreover, as the McConney court noted, de novo review is proper when a mixed question of law and fact implicates constitutional rights. 728 F.2d at 1203. Clearly, when we are required to

apply the legal standard for probable cause, we must go beyond the facts of the case and consider the "abstract legal principles that inform constitutional jurisprudence." Id. Other state courts follow the rule of de novo review as well. See, e.g., State v. Rubio, 771 P.2d 537 (Idaho App.), rev. denied, 788 P.2d 1332 (Idaho 1989); People v. Caserta, 463 N.E.2d 190 (Ill. App. 1984); see also People v. Loewen, 196 Cal. Rptr. 846, 850, 672 P.2d 436, 440 (1983) (whether search was "reasonable" within the meaning of the constitution is a question of law, and appellate court must exercise its independent judgment, measuring the facts, as found by the trier, against the constitutional standard of reasonableness).

4. Application of the Probable Cause Standard

In undertaking de novo review of the probable cause determination under the redrafted affidavit, we must apply

the standard articulated by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). Under Gates, probable cause exists if "given all the circumstances set forth in the affidavit . . . there is a fair possibility that contraband or evidence of a crime will be found in a particular place." Id. at 238, 103 S.Ct. at 2332. In Carter, we applied the Gates standard using the following test:

> An officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known to the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched.

145 Ariz. at 110, 700 P.2d at 497 (citations omitted).

The redrafted affidavit indicates that Kadous knew the following facts at the time he applied for the search warrant: first, Moore, the victim of the bombing, had been involved in a minor

traffic accident with Buccini several weeks before the bombing; second, a note reading "drop it" was found on the victim's vehicle; third, Buccini could account for his whereabouts on the night in question and had named several witnesses who could verify his presence at the bar and at his parents' residence before, during, and after the bombing, which occurred at 11:56 p.m.;[8] and finally, Buccini apparently had lawfully experimented with explosives and had gunpowder and fuse in his home.

In this case, the property to be seized constituted items that could be used to make an explosive device. Buccini never denied that he had worked in an ammunition supply store and that he

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[8] The dissent speculates that the alibi was not airtight. Infra at 26-27. From the facts known to Officer Kadous, however, the alibi was complete. It certainly might have been disproved by police investigation, but supplying misinformation to the magistrate does not qualify as investigation.

kept such items in connection with his reloading hobby. We have no quarrel, then with the court of appeals' statement that there was probable cause to believe that such items would be found in the search. Buccini, 165 Ariz. at 110, 796 P.2d at 912. However, justification for a search requires more. The inquiry is not whether these items could be found in Buccini's house; the critical question is whether such items were connected with the particular criminal activity of which he was suspected.[9] Gates, 462 U.S. at 2388, 103 S.Ct. at 2322; Carter, 145 Ariz. at 110, 700 P.2d at 497. Any other result would justify search of any

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[9] The dissent infers that there was reason to believe material would be found in Buccini's home that might be used for illegal activities. Infra at 27-28. The point is irrelevant. The affidavit submitted by Officer Kadous sought a warrant to search for evidence of a particular bombing, not for evidence of other illegal activities, such as the manufacture of firecrackers. Cf. infra at 27-28.

premises connected with the use, distribution, or sale of guns or explosive materials. The items to be seized were not contraband, nor are the materials or equipment in question "inherently criminal." Thus, the strength of the inference that the items were connected with criminal activity depends upon the strength of the evidence indicating that Buccini was responsible for the bombing.

The affidavit recounts the fact that Buccini and Moore were involved in a traffic accident. There was no evidence that the encounter was hostile or that Buccini later evinced any threatening behavior toward Moore. Further, there was no evidence that the note reading "drop it" was tied in any way to Buccini. It is not alleged in the affidavit or otherwise that Moore or his insurer had instituted any type of proceedings against Buccini or that

Buccini was aware of any threat to do so. Thus, the phrase "drop it" seems to have little relevance when related to an incident that occurred weeks earlier. In short, the affidavit does not show that, so far as Buccini knew, Moore had anything to "drop."

The facts relating to Buccini's alibi, then, were critical to the probable cause determination. If Buccini had a firm alibi for the time of the bombing, there would be no basis to believe that the items in his home were connected to the bombing, and therefore no probable cause. Absent facts indicating that the alibi was untrue, we cannot say that a reasonably prudent person would be justified in concluding that the items sought were connected with criminal activity. To the contrary, the officer's deliberate or reckless omission and misstatement of material facts indicates that he was acting mainly upon

a suspicion or hunch that Buccini was responsible for the bombing. An officer's mere suspicion that a search will reveal items connected to criminal activity is not sufficient to establish probable cause. United States v. Kandlis, 432 F.2d 132 (9th Cir. 1970); State v. Hutton, 110 Ariz. 339, 341, 519 P.2d 38, 40 (1974). To the contrary, as the United States Supreme Court pointed out in Johnson v. United States:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

333 U.S. 10, 13-14, 68 S.Ct. 367, 369 (1948).

We conclude, therefore, that the redrafted affidavit does not provide probable cause to support the issuance of

the warrant. The redrafted affidavit fails to show probable cause connecting Buccini or Buccini's home with the crime. While it shows that he possessed property of the type that might be connected with the crime, it also shows that this possession is explained and is not refuted by any facts cited in the affidavit. Further, the redrafted affidavit shows an alibi for the crime, and, again, the affidavit provides no facts indicating the alibi to be untrue or possibly untrue.

Because the materiality of false statements or omissions is reviewed de novo, we need not accord any special deference to the trial judge's findings in this regard. See Grandstaff, 813 F.2d at 1355. However, in this case, given the importance of the alibi to the probable cause determination, we are compelled to agree with the trial judge's conclusion that had Kadous truthfully

revealed the fact that Buccini had an alibi and witnesses, the magistrate would have been prompted to inquire whether Kadous had attempted to verify the alibi. Thus, the omission was material in that it rendered the affidavit "substantially misleading" and was also necessary to the finding of probable cause. See People v. Aston, 216 Cal. Rptr. 771, 780, 703 P.2d 111, 120 (1985) (citing People v. Kurland, 68 Cal. Rptr. 667, 618 P.2d 213 (1980)) (omissions are material where there is a "substantial possibility" that the omitted facts would have altered a reasonable magistrate's probable cause determination).[10]

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[10] Cf. People v. McDaniel, 127 Cal. Rptr. 467, 478, 545 P.2d 843, 854 (in a bombing case, affidavit found to support probable cause determination under search warrant for defendant's car where it included the following facts: defendant was identified as being at the trailer which was later bombed; defendant was overheard speaking of his ability and inclination to use explosives for criminal purposes; defendant's car was seen in the immediate
(Footnote cont'd on next page.)

We realize that probable cause is a somewhat "fluid concept" that turns on "the assessment of probabilities in particular factual contexts." Gates, 462 U.S. at 232, 103 S.Ct. at 2329. We also agree that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. . . ." United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 3416 (1984). However, even if this were a close case on the probable cause finding, policy considerations militate in favor of resolving this probable cause determination in the defendant's favor.

The rule in non-Franks cases considers the general presumption of validity of a

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(Footnote 10 cont'd.)

vicinity of the explosion; defendant told officers after his arrest that he was experienced in the use of explosives and that there might be some explosives in his car), cert denied, 429 U.S. 847, 97 S.Ct. 131 (1976).

search warrant and the deference given to a magistrate's determination of probable cause in concluding that in a "doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." See 2 W. LA FAVE, SEARCH & SEIZURE § 4.4 at 199 (2d ed. 1987) (quoting United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965). The same rule, however, does not apply to a Franks case. To the contrary:

> [W]hen it has been established that the earlier finding of probable cause was based upon a broader set of "facts," some of which are now shown to be false, there is no longer any reason to give deference to that earlier finding. Thus, when a court reassesses a search warrant affidavit with the false allegations excised, a "doubtful or marginal case" should be resolved in the defendant's favor. That is, in such circumstances the probable cause determination should be made as it would upon a motion to suppress evidence obtained without a warrant.

Id.

The policy underlying Franks seeks to mitigate the dangers of the ex parte procedure used to obtain a search warrant, and to deter over-zealous officers from supplying false information in their efforts to obtain access to the constitutionally protected privacy of one's home or car. See Franks, 438 U.S. at 168-169, 98 S.Ct. at 2682-83. We firmly adhere to these policies and believe that where the officer has deliberately or recklessly made material misstatements and omissions in the original affidavit, it is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment.

CONCLUSION

We hold that an appellate court must use a dual standard to review a search warrant redrafted after a Franks hearing. The factual determinations of the trial judge as to the officer's

knowing, intentional, or reckless misstatements or omissions must be reviewed under a "clearly erroneous" standard. Under that standard, the trial court did not err in its implicit finding that the affidavit was, at least, recklessly false.

The legal determination of probable cause, however, must be reviewed de novo. In this case, we do not find that the redrafted affidavit was sufficient to support probable cause for the issuance of a search warrant. Therefore, we vacate the court of appeals' opinion and affirm the trial court's order suppressing the evidence obtained under the search warrant.

STANLEY G. FELDMAN, Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES MOELLER, Justice

CAMERON, Justice, specially concurring:

The term probable cause has been troublesome since the beginning of our republic. Chief Justice John Marshall in 1813 stated:

> [T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion.

Locke v. United States, 7 Cranch 339, 3 L. Ed. 364 (1813).

Others have tried to bring some harmony into the meaning stressing that:

> [There is a] difference between what [evidence] is required to prove guilt in a criminal case and what [evidence] is required to show probable cause for arrest or search. . . . There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.

* * *

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Brinegar v. United States, 338 U.S. 160, 173, 175 (1949).

> To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to his attention are sufficient in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched.

Husty v. United States, 282 U.S. 694, 700-01 (1931) (citations omitted.)

> Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing the offense has been committed.

Henry v. United States, 361 U.S. 98, 102 (1959) (citations omitted).

> [P]robable cause . . . is [a] reasonable ground of probability supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused guilty. "Probable cause" or "reason to believe", therefore, is like a third-quarter percentile; it is more information than would justify the officer saying "From all the circumstances I suspect this man", but it need not be such information as would justify the officer in saying, "From all the circumstances I know this is the man".

Monroe v. Pape, 221 F. Supp. 635, 642-43 (1963) (citations omitted).

Probable cause is more than mere suspicion. Facts that would cause the officer to investigate the matter further differ from facts that support a finding of probable cause. In this case, absent the false statements, the affidavit supported only a mere suspicion of defendant's connection to the pipe bomb.

Defendant's actions when questioned became important. His cooperation with the authorities is a point in his favor, though not conclusive. The inference in

the affidavit, that the defendant did not cooperate and wanted to avoid the police, might, if true, provide the magistrate with the missing link to warrant a prudent man to rationally believe that there was probable cause to issue the warrant.

Because the defendant had the capacity to make a pipe bomb, a capacity he no doubt shared with others in the community, does not mean he made the bomb in question. The officer should have proceeded to investigate the matter to the point that he either found probable cause or excluded defendant as a suspect. The officer's good faith belief that defendant made the bomb is not enough. Probable cause exists when the facts and circumstances known to the officer were such that a reasonable person could believe defendant committed the crime, or was in possession of evidence that would connect defendant to

the crime. Henry, 361 U.S. at 102. Furthermore, I note that when an affidavit is knowingly false in part, it tends to infect the whole affidavit and makes the state's burden more difficult.

I would affirm the decision of the trial court.

JAMES DUKE CAMERON, Justice

C O R C O R A N, Justice, dissenting:

I respectfully dissent because, even when the affidavit is redrafted to exclude the false information and take into account the omitted "alibi," sufficient evidence exists to support a reasonable finding of probable cause.

Under the Gates test, probable cause exists if a reasonable person would conclude "that the items sought are connected with criminal activity and that they would be found at the place to be searched." State v. Carter, 145 Ariz. 101, 110, 700 P.2d 488, 497 (1985). The majority admits probable cause to believe that the seized items would be found in the search, but refuses to acknowledge that the items sought are connected with criminal activity because it believes (1) that Buccini's "alibi" negates any basis to think he was responsible for the bombing, and (2) that the gunpowder and fuses in question are not "inherently criminal."

Buccini's explanation of his whereabouts, however, is not an alibi. "Alibi" is a Latin term meaning "elsewhere" or "in another place." State v. Hubbard, 351 Mo. 143, 151, 171 S.W.2d 701, 706 (1943). In a criminal proceeding, "alibi" refers to a defense or plea that the defendant was at a different place so remote or under such circumstances that he could not have committed the charged offense. Black's Law Dictionary 71 (6th ed. 1990).

At the time the investigating officer submitted the oral, telephonic affidavit requesting a search warrant, the police believed that the bomb exploded on May 8 around 12:30 a.m., about the same time that Buccini, according to the redrafted affidavit, arrived at his parents' house after leaving the Harp and Shamrock Bar. This information does not foreclose all probability of guilt, but instead suggests that Buccini had the opportunity

to plant the bomb on his way to see his father and sister. The redrafted affidavit simply confirms the investigating officer's beliefs expressed in the original affidavit; Buccini was in fact "out around at night at the time of the bombing" and "did not have any other" witnesses who could account for his actions from the time he left the bar, which is located near the victim's residence, until he reached his parents' house. The majority cannot assume, therefore, that the magistrate would have altered his ruling had the police recounted Buccini's story in more detail.

A reasonable person could have also concluded at the time the search warrant was issued that at least some of the items seized in the consent search were illegally possessed, and therefore connected with illegal activities. The process of reloading ammunition <u>does not</u> require cannon or safety fuse. Such fuse

is purchased and used with one purpose in mind--triggering explosive devices. The manufacturing and possession of small fireworks, not to mention the more powerful bleach/mothball charges and grenade simulators described in the redrafted affidavit, are strictly regulated under Arizona statutes. See A.R.S. §§ 36-1601 to - 1608 (prohibiting the sale, use, or possession of any fireworks); §§ 13-3101 to -3104 (prohibiting the making and possession of "prohibited weapon[s]," including explosives, bombs, grenades, or a combination of materials designed or intended for use in making or converting a device into a prohibited weapon). Buccini does not claim an authorized or permitted use under municipal, state, or federal laws. See §§ 36-1605, 13-3102(C)(3). In short, we are not dealing with a gun-owner who simply reloads ammunition for a hobby. Rather,

we have, at the very least, an explosives enthusiast who not only collects demolition paraphernalia, but enjoys improvising and setting off illegal bombs.

By dissenting, I do not condone any police officer's attempt to sway a magistrate's probable cause determination with false statements or material omissions. At this juncture, however, the propriety of the officer's conduct is immaterial. When the court finds, as in this case, that an affiant knowingly, intentionally, or recklessly included a false statement or omitted relevant facts, the issue becomes whether the false or omitted information was necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978).

Here, the omitted "alibi" information and the statement that Buccini appeared "in a hurry" during the consent search were not necessary to the magistrate's

ruling. As the court of appeals correctly reasoned, "[t]he bombing, the note left on the victim's vehicle, and the victim's prior encounter with Buccini, together with the powder and fuses found during the consent search, were alone sufficient to support the issuance of the warrant." State v. Buccini, 165 Ariz. 108, 110, 796 P.2d 910, 9912 (App. 1990) (emphasis added). I believe we should reserve for a more appropriate case the issue of whether the police should verify an alleged alibi before seeking a search warrant.

Robert J. Corcoran, Justice

APPENDIX A

SEARCH WARRANT AFFIDAVIT

On May 8th at 0030 hours a pipe bomb was placed in the garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victims' vehicle. Also attached to the car window was a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at his residence. He invited me in and I interviewed him regarding this incident. He stated that he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident. He also stated that he was out around at night at the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at. I asked him if he would sign a consent to search form which he did at 1230 hours.

During the search I found gun powder, safety fuse and green cannon fuse which was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he

received some military paraphernalias [sic] and explosives from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in which he was found in possession of military ordinance [sic] and explosives. Those were also confiscated. While searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at 1400 hours. The search was concluded and the items aforementioned were seized. A complete search was not done of the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

APPENDIX B

TRIAL COURT'S ORDER

THE COURT FINDS that the statement in the affidavit that the defendant "did not have any other people to provide an alibi where he was at." is false. THE COURT FURTHER FINDS that the affidavit should have included the information that the officer had at the time which was that defendant had stated he was at the "Harp and Shamrock Bar" during part of the time in question and that he had listed alibi witnesses including Dwayne Nanna, among others. Furthermore, the officer should have listed that the defendant had, at approximately 12:30, gone to his parents' home and that his father and sister had noted his presence in the residence at that time.

THE COURT FURTHER FINDS that with the deletion of the false statement and the inclusion of the alibi statements, that the Judge would have been prompted to inquire further of the police officer as to his investigative efforts with regard to verifying the presence of the defendant with the alibi witnesses.

THE COURT FURTHER FINDS that the inclusion of the implication that the defendant was rushing the police officer in his search was incorrect. Rather, the officer should have included a statement that the defendant was, in fact, cooperating with the officer throughout the voluntary search, and that it was the officer who concluded the search based on his own knowledge that the defendant had to go to work that day.

Accordingly, THE COURT FINDS the remaining affidavit is insufficient to show probable cause and

IT IS ORDERED suppressing all fruits of the illegal search.

Minute Entry, March 29, 1989.

APPENDIX C

REDRAFTED SEARCH WARRANT AFFIDAVIT

On May 8 at 0030 hours a pipe bomb was placed in the garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victim's vehicle. Also attached to the car window was a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at his residence. He invited me in and I interviewed him regarding this incident. He stated that he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident. ~~He also stated that he was out around at night at the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at.~~ He stated that he was at the Harp and Shamrock Bar on the night of the bombing, and named witnesses who could verify this, including Dwayne Nanna, among others. He also stated that he went to his parents' home at approximately 12:30 and that his father and sister had noted his presence in the residence at that time. I asked him if he would sign a consent to search form which he did at 1230 hours.

During the search I found gun powder, safety fuse and green cannon fuse which

was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he received some military paraphernalia and explosives from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in which he was found in possession of military ordnance and explosives. Those were also confiscated. ~~While searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at 1400 hours. The search was concluded and the items aforementioned were seized.~~ Buccini was cooperative throughout the search. I concluded the search because I knew that Buccini had to go to work at 1400 hours. The aforementioned items were seized. A complete search was not done on the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

Supreme Court, U.S.
FILED
JUL 15 1991
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No. 90-1926

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

RICHARD JOSEPH BUCCINI,

Respondent.

ON WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

No issue is before this Court to warrant review. The Arizona Supreme Court decided only one issue: the standard of review used by an Arizona appellate court in reviewing a redrafted affidavit under this Court's procedure established in Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978). The Arizona Court of Appeals had applied a limited "abuse of discretion" standard of review. The Arizona Supreme Court held the less stringent "de novo" standard was appropriate. The State of Arizona clearly misstates its alleged "issue" as a question presented for review.

The Arizona Supreme Court never required an affiant pursuant to Franks "to investigate all possible leads and

witnesses prior to seeking a search warrant" as the State of Arizona somehow proffers to this Court. Further, the Arizona Supreme Court never placed an "affirmative show[ing]" upon the affiant to provide exculpatory evidence to a magistrate when an affiant requests a search warrant.

The Arizona Supreme Court simply upheld a long established standard that when applying a totality of circumstances rationale, an appellate court should defer to the trial court's determination that an affiant is incredible, has provided false information to a magistrate to obtain a search warrant, has omitted material facts, has misstated the situation and has failed to conduct a thorough

investigation.[1] When such a situation exists, a redrafting of the search warrant is necessary. All courts agree with this concept. Therefore, the only "issue" present is: After a finding pursuant to a Franks hearing that the affiant seeking a search warrant provided false information and recklessly omitted material facts, if the redrafted affidavit lacks probable cause, should the warrant be found defective and evidence found pursuant to the defective warrant suppressed.

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[1] The State of Arizona does not contest the factual findings of the trial court regarding the falsity or recklessness of the statements in the affidavit. Petition for Writ of Certiorari, p. 10, n.1.

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OPINION BELOW

The Arizona Supreme Court addressed one issue. Review was granted to clarify the appropriate standard used by an appellate court in Arizona in reviewing the sufficiency of a redrafted search warrant affidavit under the procedure established by this Court as it applies to the Constitution of United States in Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978), and as it applies to the Arizona Constitution in State v. Carter, 145 Ariz. 101, 700 P.2d 488 (1985). The Arizona Supreme Court held that the trial court did not abuse its discretion in finding that the affiant provided false information to the magistrate, misstated material facts, and deceived the magistrate in obtaining a search warrant. The Arizona

Supreme Court further held that the trial court must undertake an independent review of the effect of the false statements on probable cause because the question turns on the consequences of a fraud on the issuing magistrate which that magistrate was not in a position to evaluate.

The Arizona Supreme Court held that on review, an appellate court should conduct a de novo standard of review as to whether a redrafted search warrant is sufficient to establish probable cause. In doing so, the Arizona Supreme Court agreed with the trial court that no probable cause existed.

STATEMENT OF JURISDICTION

The Respondent adopts Petitioner's Statement of Jurisdiction.

CONSTITUTIONAL PROVISIONS

The Respondent adopts Petitioner's recitation of Constitutional provisions involved and provides this Court with the pertinent part of the Arizona Constitution, which provides:

> **Art. 2 § 8. Right to privacy**
> Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

STATEMENT OF THE CASE

The Respondent adopts Petitioner's Statement of the Case, however, rejects the State of Arizona's conclusion that the only reasons the Arizona Supreme Court found no probable cause existed was because the Respondent "had given explanations for the presence of the explosive material and a list of alibi witnesses [were] not investigated by the police." (See, Petition for Writ of Certiorari, p. 9.)

The Arizona Supreme Court found no abuse of discretion in the trial court's finding that the affiant was not credible and had in fact, misstated material facts to the magistrate to obtain the search warrant. (Appendix A at A-18-25.) The State of Arizona does not contest this finding. The Arizona

Supreme Court further agreed with the trial court that the affiant made material omissions to the magistrate. The Arizona Supreme Court found that even if this were a close case on the probable cause finding (which it was not), policy considerations dictate in favor of resolving this probable cause determination in the defendant's favor. (Appendix A at A-39.) The Arizona Supreme Court, after a de novo review (Appendix A at A-25-28), redrafted the affidavit and agreed with the trial court that the redrafted affidavit lacked the requisite probable cause for the issuance of a search warrant.

REASONS FOR DENYING THE PETITION

In Franks v. Delaware, supra, this Court held that a defendant may challenge an affidavit for a search warrant under certain circumstances. Should those circumstances exist, a hearing must be held. 438 U.S. at 171-172, 98 S. Ct. at 2684-85.

The State of Arizona has never disputed that a hearing was appropriate in this matter. In fact, the State of Arizona does not dispute the factual findings of the trial court that the officer presented false statements to the magistrate. (See, Petition for Writ of Certiorari, p. 10, n.1.[2])

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[2] The State of Arizona also does not dispute the officer's recklessness in providing such false statements. Id. The State of Arizona, in short, admits that the affiant, Officer Kadous, lied to a neutral and detached magistrate and tainted the warrant process.

However, the State of Arizona grasps at one minor finding of fact and attempts to create an issue. Even a cursory review of the record shows that this "issue" was never previously raised. The State of Arizona claims that the Arizona Supreme Court held that "the State was required to investigate all possible leads and witnesses prior to seeking a search warrant...." (See, Petition for Writ of Certiorari, p. -i-, emphasis added.) The State of Arizona also states that, somehow, the Arizona Supreme Court placed an "affirmative" duty on an affiant to provide all exculpatory evidence to a magistrate or the affidavit becomes "lacking in probable cause." Id. The State of Arizona misstates both the true issue and the facts.

This action involves a law enforcement officer who lied. He lied to a magistrate in obtaining the warrant and at the hearing held pursuant to Franks, lacked any credibility. The State of Arizona does not dispute that the officer lied. The record is clear that the officer lacked credibility at the Franks hearing.

What the State of Arizona refuses to admit is that, notwithstanding all of the lies, the officer could have compiled the requisite probable cause if he simply would have completed his investigation. Also, the officer would have eliminated any possessed suspicion or hunch if he had completed his investigation.

The State of Arizona submits there is some sort of conflict in the courts

regarding the standard of review by an appellate court. First, the standard applicable in a Franks hearing by an appellate court is de novo review approved by this Court. See, United States v. Elliott, 893 F.2d 220, 222 (9th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 268 (1990); United States v. Dozier, 844 F.2d 701, 705 (9th Cir.) cert. denied, 488 U.S. 927, 109 S. Ct. 312 (1988); United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir.), cert. denied sub nom Brown v. United States, 484 U.S. 837, 108 S. Ct. 119 (1987); United States v. McConney, 728 F.2d 1195, 1203 (9th Cir.), cert. denied, 469 U.S. 824, 105 S. Ct. 101 (1984). See also, United States v. Fawole, 785 F.2d 1141 (4th Cir. 1986). Therefore, the State of Arizona's first contention

that some conflict exists simply is not true.

Next, the State of Arizona claims a conflict exists between People v. Sundermeyer, 769 P.2d 499 (Colo. 1989), State v. Beaty, 118 Idaho 20, 794 P.2d 290 (1990) and the Arizona Supreme Court's decision in this action. Sundermeyer is fact specific and that court, along with the court in Beaty, did not redraft an affidavit. In Sundermeyer, that court did not need to redraft an affidavit because the supposed omission[s] of material facts "were not adverse [to the defendant] and, although relevant, merely buttressed the facts which supported the warrant." 769 P.2d at 501. The supposed omission did not make the affidavit misleading. Id. Therefore,

the first "prong" of Franks was not met. In Buccini, even the State agrees that a redrafted affidavit pursuant to Franks was appropriate because the affiant in Buccini misstated and omitted material facts.

Likewise, in Beaty, the first "prong" of Franks was again the issue and a redrafted affidavit was not discussed. Both cases cited have nothing to do with the facts in Buccini. Sundermeyer and Beaty both address the standard of review when appellate courts address the magistrate's finding of the veracity of the affiant to obtain a search warrant, the first prong of Franks. Sundermeyer and Beaty do not address the standard of review applicable where a redrafted affidavit, after a Franks hearing is considered on

appeal. As previously stated, de novo review is clearly the appropriate standard of review.

The State of Arizona wants this Court to ignore the true issue which resulted in a finding of a lack of probable cause in the affidavit as applied to Buccini. The State of Arizona claims that "the majority [of the Arizona Supreme Court] focused on the effect the information might have had on the magistrate" and that the "dissent, on the other hand, focused on whether the affidavit still contained probable cause, after redrafting." (See, Petition for Writ of Certiorari, p. 12.) This statement is false. The entire Arizona Supreme Court addressed the redrafting procedure. "Although this Court has never expressly

considered this issue, we believe that de novo review is the proper standard to review a trial court's finding as to whether a redrafted search warrant affidavit is sufficient to establish probable cause." (Appendix A at A-25, emphasis added and citations omitted.)

The Arizona Supreme Court's decision is replete with discussions of the redrafting procedure mandated by Franks and the court's subsequent re-evaluation of probable cause. The Arizona Supreme Court, like the trial court, redrafted the search warrant affidavit to see whether the requisite probable cause existed. (Appendix A at A-55-60.) In fact, the Arizona Supreme Court's redrafted affidavit was provided fully in the opinion and cited to this Court in the State of Arizona's

Statement of the Case. (Petition for Writ of Certiorari, p. 7.) Therefore, the State of Arizona's supposition is unfounded and the Petition for Writ of Certiorari lacks any substance.

The Arizona Supreme Court applied a de novo review of the probable cause existing in the redrafted affidavit as did the trial court. In doing so, the Arizona Supreme Court applied the standard articulated by this Court in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) (Appendix A at A-29-30.)

> Under Gates, probable cause exists if 'given all the circumstances set forth in the affidavit...there is a fair probability that contraband or evidence of a crime will be found in a particular place.' Id. at 238, 103 S. Ct. at 2332. In Carter, we applied the Gates standard using the following test:
>
> An officer has probable cause to conduct a search

> if a reasonably prudent person, based upon the facts known to the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched.'

145 Ariz. at 110, 700 P.2d at 497 (citations omitted).

The Arizona Supreme Court, after redrafting the affidavit to delete misleading statements and include important information omitted by the affiant, evaluated all the information the affiant possessed at the time he applied for the search warrant. First, Moore, the victim of the bombing, had been involved in a minor traffic accident with Buccini several weeks before the bombing (Appendix A at A-30-31); second, a note reading "drop it" was found on the victim's vehicle; third, Buccini could account for his whereabouts on the night in question and

had named several witnesses who could verify his presence before, during and after the bombing; and, finally, Buccini apparently had lawfully experimented with explosives and had gunpowder and fuse in his home Id. The Arizona Supreme Court then carefully evaluated these factors.

The Court found that the fact that Buccini had gunpowder and fuse in his home did not alone justify a search. (Appendix A at A-31-33.) Buccini never denied he had previously worked in an ammunition store and participated in the hobby of reloading. Further, the items seized were not contraband or "inherently criminal." (Appendix A at A-33.) The Arizona Supreme Court followed this Court's direction and found that the fact that the innocent

material was present was not the issue. The critical question was whether these items were connected with criminal activity of which he was suspected. Gates, 462 U.S. at 238, 103 S. Ct. at 2322. The strength of the remainder of the facts the affiant possessed was therefore most important. (Appendix A at A-32.)

> The inquiry is not whether these items could be found in Buccini's house; the critical question is whether such items were connected with the particular criminal activity of which he was suspected. Gates, 462 U.S. at 238, 103 S. Ct. at 2322; Carter, 145 Ariz. at 110, 700 P.2d at 497. Any other result would justify search of any premises connected with the use, distribution, or sale of guns or explosive materials. The items to be seized were not contraband, nor are the materials or equipment in question 'inherently criminal.'

As to the accident involving Moore and Buccini, the Arizona Supreme Court again agreed with the trial court that

there was no evidence the encounter was hostile or Buccini acted in a threatening manner. (Appendix A at A-33.) "Further, there was no evidence that the note reading 'drop it' was tied in any way to Buccini.... In short, the affidavit does not show that, so far as Buccini knew, Moore had anything to 'drop'." (Appendix A at A-33-34.) With this information, the Arizona Supreme Court, agreeing with the trial court, found the affidavit lacked probable cause.

The trial court and the Arizona Supreme Court agreed that the affiant could have obtained the requisite probable cause by way of a simple investigation. It is uncontroverted that Buccini had a firm alibi. This alibi was not "potentially exculpatory

evidence" as the State of Arizona claims. The alibi was also not a "defense, which rested upon the testimony of interested parties like family members or friends." (See, Petition for Writ of Certiorari, p. 17.) Buccini informed the affiant that his whereabouts at the specific date and time could be verified by numerous people. The affiant was informed that Buccini was at the Harp & Shamrock Bar. The record shows that Buccini informed the affiant that the bar owner's son and daughter, Dwayne and Bernadine Nanna, as well as the bartender, the bartender's boyfriend, Mike, (a member of the Military Police at Davis Monthan Air Force Base located in Tucson), and a Drug and Alcohol Agent named Keith could all verify his presence at the bar.

Buccini further told the affiant that he was at his parents' home and spoke to his father and sister at approximately 12:30 a.m. The affiant testified to the trial court during the Franks hearing that only two alibi witnesses, the Nannas, were mentioned by Buccini. The affiant told the Magistrate in his affidavit that Buccini "did not have any other people to provide an alibi where he was at." (Appendix A at A-55-56.) [3] The affiant, although aware that Buccini would be at work for some time, failed

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[3] This, of course, was a lie. Again, the State of Arizona attempts to minimize this lie by falsely claiming that the only witnesses to verify Buccini's whereabouts were members of his family and implies this law abiding family would lie, as the affiant did to the magistrate. Such a defaming statement is simply without merit.

to attempt to contact any of these people. The Arizona Supreme Court was dismayed that the affiant lied about the existence of any alibi witnesses, while refusing to proceed with the facts he possessed by simply contacting the named, disinterested people who could easily prove or disprove Buccini's alibi. In short, had the affiant just finished his investigation, probable cause for the search warrant would have been obtained or the affiant's hunch and suspicion would have dissipated.[4]

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[4] The Arizona Supreme Court noted that Moore, the victim of the bombing, had expressed to an investigating officer that the threat might relate to his position as president of a professional organization and his duties therein. (Appendix A at A-5.) Therefore, Buccini was not even a suspect. After this meeting with Buccini, the affiant at best possessed only a mere hunch or suspicion that Buccini was involved in the incident

(Footnote continued on next page.)

This Court, reviewing the facts before the trial court and the Arizona Supreme Court, will find that the affiant lied; even the State of Arizona agrees that the affiant lied. The affiant did not only lie about Buccini's airtight alibi. The court observed the affiant, under oath, and found him to lack credibility as to almost all the events surrounding his application for a search warrant.

For example, the affiant stated in his affidavit that Buccini was avoiding the consent search which occurred upon the affiant's first contact with Buccini at an unannounced visit at Buccini's

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(Footnote [4] continued.)

at all. This Court has consistently required a magistrate be presented with more than hunches and suspicions. See, e.g. Johnson v. United States, 33 U.S. 10, 13-14, 68 S.Ct. 367, 369 (1948).

home. The affiant expressed non-cooperation on Buccini's part. However, Buccini cooperated so fully during the meeting that he even provided items also seized which the affiant did not know existed. All the items seized, by Buccini's consent to search and by way of the subsequent warrant were consistent with innocent conduct.[5] The record is replete with the affiant's lack of credibility. It was clear that the trial court and the Arizona Supreme Court reviewed all the facts and found no probable cause to exist.

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[5] It should be noted that the hobbies of reloading and the like are common in Arizona, which may differ from the crowded living atmosphere of cities or other parts of this country. The affiant admitted at the Franks hearing the materials seized were consistent with the innocent behavior on behalf of Buccini.

Contrary to the State of Arizona's misleading position presented to this Court (See, Petition for Writ of Certiorari, p. 19), no "motive" or "grudge" existed against Mr. Moore. Again, as the Arizona Supreme Court found:

> There was no evidence that the encounter was hostile or that Buccini later evinced any threatening behavior toward Moore. Further, there was no evidence that the note reading 'drop it' was tied in any way to Buccini. It is not alleged in the affidavit or otherwise that Moore or his insurer had instituted any type of proceedings against Buccini or that Buccini was aware of any threat to do so. Thus, the phrase "drop it" seems to have little relevance when related to an incident that occurred weeks earlier. In short, the affidavit does not show that, so far as Buccini knew, Moore had anything to "drop". (Appendix A at A-33-34.)

Further, Buccini was socializing with disinterested people who could, along with his family, verify that Buccini

could not have committed the alleged crime.

The State of Arizona's unfounded conclusion that Buccini possessed "the same kind of fuse as that used in the pipe bomb" defies the record and is simply false, as is the completely unsupported assertion that "he has ties to illegally possessed military explosives." The State of Arizona on appeal maintains the same credibility as the affiant in this case.

Under a totality of circumstances rationale and given the fact that the officer supplied false information to the magistrate and acted recklessly in withholding material information, the fact remains that the redrafted affidavit lacked the requisite probable cause. This simply is not a case that

is appropriate for review by this Court. As the Arizona Supreme Court found, the issue of probable cause is not even a close one. (Appendix A at A-39.) It would seem improper for this Court to second guess the trial court that evaluated the credibility of the witnesses and the testimony, as well as the evidence presented, and made a factual determination as to findings of the troublesome term of probable cause. (See, Justice Cameron's special concurrence, Appendix A at A-43-48.)

Franks and its progeny are not in question. The Arizona Supreme Court fulfilled this Court's expressed standards regarding an affiant who knowingly, intelligently, or recklessly misstated or omitted material facts in

acquiring a search warrant. The Arizona Supreme Court's reasoning is clear:

> The policy underlying Franks seeks to mitigate the dangers of the ex parte procedure used to obtain a search warrant, and to deter over-zealous officers from supplying false information in their efforts to obtain access to the constitutionally protected privacy of one's home or car. See, Franks, 438 U.S. at 168-169, 98 S. Ct. at 2682-83. We firmly adhere to these policies and believe that where the officer has deliberately or recklessly made material misstatements and omissions in the original affidavit, it is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the Fourth Amendment.

Based on this reasoning, the Arizona Supreme Court concluded:

> We hold that an appellate court must use a dual standard to review a search warrant redrafted after a Franks hearing. The factual determinations of the trial judge as to the officer's knowing, intentional, or reckless misstatements or omissions must be reviewed under a "clearly erroneous" standard. Under that standard, the trial court did not

> err in its implicit finding that the affiant was, at least, recklessly false.[6]
>
> The legal determination of probable cause, however, must be reviewed de novo. In this case, we do not find that the redrafted affidavit was sufficient to support probable cause for the issuance of a search warrant. (Appendix A at A-41-43.)

Justice Cameron, in his special concurrence, highlights the issue before the trial court and the Arizona Supreme Court when he states: "Furthermore, I note that when an affidavit is knowingly false in part it tends to infect the whole affidavit and makes the state's burden more difficult." (Appendix A at A-47-48.)

The standards set forth in Franks have been upheld. The State of Arizona's supposed "issue" simply does

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[6] Again, the State does not contest this finding.

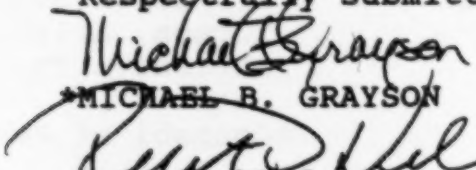
not exist. Probable cause to issue a search warrant pursuant to these specific facts simply did not exist. The trial court's suppression order was proper.

CONCLUSION

The State of Arizona presents no issue for review. Under any rationale, the affiant's lack of credibility and reckless, if not intentional, misstatements to the magistrate, mandated a Franks hearing. After redrafting the erroneous request to search, the affidavit was clearly lacking probable cause and therefore tainted. The State of Arizona's Petition is without merit. Therefore, the Petition for Writ of Certiorari should be denied.

DATED this 11 day of July, 1991.

Respectfully submitted,



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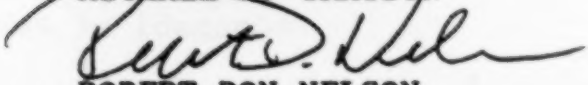

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THREE COPIES of this Brief were mailed this 15 day of July, 1991, to:

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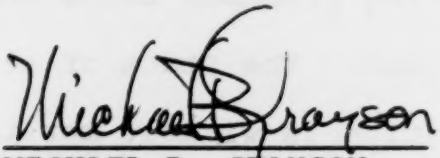

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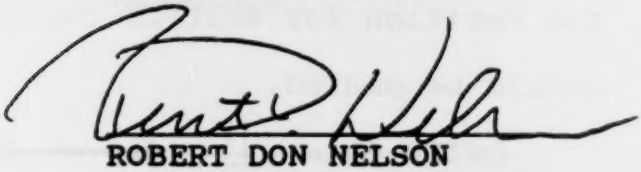

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APPENDIX "A"

[Filed Apr. 18, 1991]

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

State of Arizona,	**Supreme Court**
	No. CR-90-0124-PR
Appellee,	
vs.	**Court of Appeals**
	No. 2CA-CR 89-0215
RICHARD JOSEPH BUCCINI,	**Pima County**
	No. CR-24658
Appellant.	
	O P I N I O N

Appeal from the Superior Court of
Pima County,
The Honorable Lina S. Rodriguez, Judge

AFFIRMED

Opinion of the Court of Appeals,
Division Two, 165 Ariz. 108,
796 P.2d 910 (Ct. App. 1990),
vacated

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FELDMAN, Vice Chief Justice

Richard Buccini petitioned for review, asserting that the court of appeals erred in reversing a superior court order suppressing evidence seized on a search warrant. State v. Buccini, 165 Ariz. 108, 796 P.2d 910 (Ct. App. 1990). We granted review to clarify the appropriate standard to be used by an appellate court in reviewing the sufficiency of a redrafted search warrant affidavit under the procedure established in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). See Rule 31.19, Ariz.R.Crim.P., 17 A.R.S. We have jurisdiction pursuant to Ariz. Const. art 6, §5(3) and A.R.S. §12-120.24.

FACTS AND PROCEDURAL HISTORY

Shortly after midnight on May 8, 1988, a pipe bomb exploded in the carport of Howard Moore's Tucson home. Although Moore heard a loud explosion, he did not realize that his property had been damaged until the following morning. Moore then telephoned the police, and Officer Karn was dispatched to Moore's home to secure the area and make a report.[1] The bomb damaged the carport and Moore's automobile. Moore called Karn's attention to a note that read "drop it," which was stuck to the car window on the driver's door.

Karn asked Moore who could have been responsible. Moore replied that he

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[1] The following facts are taken from the State's Opposition to Motion to Suppress, Exhibit C, Officer Karn's Report.

had been involved in a minor traffic accident six weeks earlier with a van owned by Canyon Ranch. The driver of the van, Richard Buccini, apologized and offered to pay for the damage himself. He asked Moore not to report the accident to the police, as he was afraid that a citation would jeopardize his job. However, a bystander had already called the police. When the police arrived, Buccini claimed that Moore was partially at fault. The officer wrote a report on the accident but did not cite Buccini or Moore. Moore told Karn that his own insurance company had paid him for the damage but planned to ask for reimbursement from Canyon Ranch. Moore did not say that Buccini knew this or that he had lost his job as a result of the incident, nor did he report any

further contact with Buccini. Moore also told Karn that the threat might relate to his position as president of the Veterinarian Association because it was part of his job to investigate claims against veterinarians. Moore could not, however, identify any particular situations that could relate to this threat.

Karn then called the Bomb Unit at the Tucson Police Department, and Detectives Kadous and Weadock responded. Kadous and Weadock spoke with Moore, photographed the scene, and collected the evidence, while Karn interviewed the surrounding neighbors. Several neighbors had heard the noise of the explosion. Most estimated that it had occurred between 12:00 and 12:30 the previous night. One neighbor stated

that the noise had occurred at 11:56 p.m. and that he had been alarmed and immediately telephoned 911. Karn's report includes the fact that the call was made, along with its documenting number.

At about noon on May 12, 1988, Kadous went to Buccini's apartment to interview him. Kadous was aware only that Buccini and Moore had been involved in an automobile accident in March and that Moore could not think of anyone but Buccini who could have had a reason to threaten him. At the time of the interview, Kadous was apparently still uncertain about the exact time of the bombing, although he had spoken with Karn and possibly read her report disclosing the existence of the 911 call at 11:56. (Transcript of Hearing on

Motion to Suppress -- Kadous' statement (HT).)

Buccini was cooperative when Kadous approached him, and invited him in. Kadous conducted a "pretape interview," the content of which is disputed, and a taped interview. It is undisputed that Buccini denied having any involvement in the bombing and stated that he was at the Harp and Shamrock Bar until between 12:00 and 12:30 that night, giving the names of at least two witnesses who could verify this. (HT at 26.) Buccini then stated that after he left the bar, he went to his parents' house, where he had a sandwich and spoke with his sister and father. He left his parents' house at approximately 1:00 a.m. and went home.

After telling Kadous about the events of May 8, Buccini singed a form giving Kadous consent to search his apartment. During the search, Kadous found gun powder and certain types of fuses. Buccini explained that he was formerly an employee of Jensen's Custom Ammunition and that he had a hobby of reloading ammunition. Buccini also mentioned, apparently even before the search, that he had used cannon fuse obtained at Jensen's to try to detonate bleach and mothballs, and that he and a friend, Carl Weisel, at one time used to go out to dirt caves and set off grenade simulators.

Buccini was still employed at Canyon Ranch and had to be at work at 2:00 p.m. that day, so the search terminated after Kadous took possession

of the gun powder and fuses. Kadous admits that Buccini was completely cooperative and even assisted Kadous as he searched. (HT at 44.)

Following the consent search and Buccini's departure for work, Kadous made a telephonic request for a search warrant.[2] He sought to search Buccini's apartment and car for any "materials," "tools," or "equipment" that cold be used to "construct an explosive device." Kadous described the March car accident and the May bombing incident. He explained that he had interviewed Buccini and that Buccini told him "he was out around at night at

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[2] Under A.R.S. §13-3914(C), a magistrate may take the affiant's oral statement under oath by telephone. This statement is recorded and deemed to be an affidavit for purpose of issuance of a search warrant.

the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at." He said that Buccini had consented to a search, during which he discovered the fuses and gunpowder. He concluded that "while searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at 1400 hours." He stressed that a complete search had not been done and that he believed that evidence would be concealed or destroyed if the residence was not search immediately.[3]

A superior court judge, sitting as a magistrate (see A.R.S. §1-215(13)), issued a search warrant, and Kadous

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[3] The relevant text of the search warrant affidavit is set forth in Appendix A to this opinion.

conducted a search of Buccini's apartment and car, which yielded several items of evidence. Following Detective Kadous' testimony before a Pima County grand jury, Buccini was indicted on several counts.

Buccini filed a motion to suppress the evidence seized pursuant to the search warrant on the ground that Kadous omitted or misrepresented material facts in the affidavit. Specifically, Buccini claimed the affidavit omitted material facts as to Buccini's alibi, falsely stated there were no alibi witnesses, and falsely implied that Buccini attempted to terminate the search before all the evidence was uncovered, thus giving Kadous reason to think that Buccini would later conceal or destroy evidence. Buccini claimed that if

Kadous had not made these material omissions and misrepresentations, the magistrate would not have found probable cause to issue the search warrant.

The trial court ordered an evidentiary hearing on the motion to suppress. Buccini and Kadous testified extensively at the hearing. At the conclusion of the testimony, the trial court granted the motion to suppress. The trial judge found that Kadous falsely stated in the affidavit that Buccini did not have anyone to confirm his alibi. The trial judge also found that the affidavit omitted the information about where Buccini claimed to have been on the night of the bombing and the names of his alibi witnesses. The judge believed that including this additional information would have

prompted the magistrate issuing the warrant to inquire whether Kadous had attempted to verify the alibi. The trial judge also found that the affidavit falsely implied that Buccini was uncooperative. Instead, the affidavit should have included the truthful statement that Buccini was cooperative throughout the investigation. The judge concluded that once the false information was eliminated and the omitted material information added, the affidavit was insufficient to show probable cause.[4]

Upon the state's motion, the case was dismissed without prejudice. The state then appealed from the suppression order (see A.R.S. §13-4032(7)), alleging

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[4] The trial court's order is set forth in Appendix B to this opinion.

that the trial court used an incorrect standard to judge the contents of the affidavit and therefore abused its discretion in suppressing the evidence.

The court of appeals correctly noted that a defendant may challenge the veracity of factual statements contained in an affidavit supporting the issuance of a warrant. Buccini, 165 Ariz. at 110, 796 P.2d at 912 (citing Franks, 438 U.S. 154, 98 S.Ct. 2674). Applying Franks' two-pronged test, the court first assumed, without deciding, that Buccini had proved the existence of a falsehood made with the requisite mental state, i.e., with knowledge, intent, or reckless disregard. Turning to Franks' second prong, the court held that even after the affidavit was redrafted to exclude the false information and

include the omitted material information, "it is clear that probable cause existed to believe that these items would be found in Buccini's apartment and automobile." Id. Concluding, therefore, that the trial court had abused its discretion, the court vacated the suppression order and remanded the case. Id. at 111, 796 P.2d at 913.

Buccini then petitioned for review, asserting that the court of appeals erred in disregarding the findings of the trial court judge, which were based on her assessment of the "facts and witness credibility," and improperly substituted its own judgment on the facts to find that the search warrant was supported by probable cause.

DISCUSSION

A. The Parties Assert that Abuse of Discretion Standard Applies

Buccini argues that a trial court's ruling on a motion to suppress must be upheld absent an abuse of discretion, and that its findings of fact underlying the motion to suppress must be accepted unless clearly erroneous. Petition for Review (PR) at 14-15. According to Buccini, the trial court's finding that the redrafted search warrant did not establish probable cause was essentially a factual determination. PR at 14. Thus, the court of appeals erred in redrafting the affidavit and then reversing "the factual determinations of the trial judge in determining probable cause." PR at 14.

Agreeing that the appropriate inquiry is whether the trial court

abused its discretion, the state claims, first, that the trial court did not find that Kadous intentionally, knowingly, or recklessly lied to the magistrate. Opposition to PR at 5-6. Second, even if such falsehoods are assumed to exist and deleted from the affidavit, the redrafted affidavit contains facts that show probable cause.

B. **Review of a Trial Court's Findings at a *Franks* hearing**

1. Allegations Pertaining to Falsity of Averments

In Franks, the Supreme Court held that a defendant is entitled to a hearing to challenge a search warrant affidavit when he shows (1) that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the affidavit, and (2) the false statement

was necessary to the finding of probable cause. 438 U.S. at 155-56, 98 S.Ct. at 2676. The defendant must establish the first prong of the test by a preponderance of the evidence before the court may set the false material aside and view the affidavit's remaining content to see whether it is sufficient to establish probable cause. Id. at 156, 98 S.Ct. at 2676. If the affidavit is then insufficient to establish probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id.

2. Nature of the Falsehood

This court has followed Franks when considering challenges as to the truthfulness of factual statements in a

search warrant affidavit. State v. Carter, 145 Ariz. 101, 108, 700 P.2d 488, 495 (1985); State v. Poland, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982). In Carter, we also held that where the falsehoods or omissions were deliberate or reckless, the court must redraft the affidavit by deleting the falsehoods and adding the omitted material facts before moving on to the probable cause determination. 145 Ariz. at 109, 700 P.2d at 496. The trial judge in this case clearly redrafted the affidavit in accordance with Franks and Carter, and also, we assume, followed the law in determining that the misstatements and omissions of material fact were made with the requisite state of mind, before finding the remaining

facts insufficient to establish probable cause.[5]

On appeal, different standards are used to review the trial court's findings as to whether the affiant included a knowing, intentional, or reckless misstatement of fact and whether the redrafted affidavit establishes probable cause. A trial court's finding on whether the affiant deliberately included misstatements of

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[5] The judge's order did not explicitly state that the false averments were made knowingly, intentionally, or recklessly but, given the affiant both knew the correct facts while swearing to false facts and omitted other facts that he knew, the conclusion seems inescapable. Also, there is no other explanation for the judge's ruling under Franks' second prong. Franks was thoroughly discussed at argument and explicitly addressed by the trial judge. HT at 3-7. In suppressing under Franks' second prong, the trial judge necessarily considered and resolved the issues under the first.

law or excluded material facts is a factual determination, upheld unless "clearly erroneous." United States v. Fawole, 785 F.2d 1141, 1145 (4th Cir. 1986); United State v. Elliott, 893 F.2d 220, 222 (9th Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 268 (1990); United States v. Dozier, 844 F.2d 701, 705 (9th Cir.), cert. denied, 488 U.S. 927, 109 S.Ct. 312 (1988); United States v. Jenkins, 901 F.2d 1075, 1079 (11 Cir.) cert. denied, ____ U.S. ____, 111 S.Ct. 259 (1990). This standard is consistent with the general body of law holding review for clear error appropriate where the applicable legal standard provides for a strictly factual test, such as a state of mind. See United States v. McConney, 728 F.2d 1195, 1203 (9th

Cir.), cert. denied, 469 U.S. 824, 105 S.Ct. 101 (1984).

In this case, as Buccini notes, the trial judge was in a unique position to judge Kadous' credibility and determine that he was on notice of material facts that he either misstated or omitted entirely from the affidavit. The Court in Franks stressed that the showing for probable cause must be "truthful, in the sense that the information put forth is believed or appropriately accepted by the affiant as true." 438 U.S. at 165, 98 S.Ct. at 2681. It is clear that Buccini told Kadous of his alibi and named several alibi witnesses. The evidence at the hearing also showed that Kadous knew Buccini was still employed at Canyon Ranch and knew that he had to be at work that day. Therefore, the

evidence supports the trial judge's implicit finding that Kadous at least recklessly[6] misstated material facts by swearing under oath that Buccini did not have anyone to substantiate his alibi, and by inferring that Buccini was hurrying Kadous in order to prevent him

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[6] It was not necessary for the trial court to determine which of the three mental states Kadous possessed. Under the case law that preceded Franks, a misstatement by a government officer in the affidavit made with intent to deceive the magistrate was held to void the warrant altogether. 2 W. LA FAVE, SEARCH & SEIZURE §4.4, at 198 (2d ed. 1987). This is still the law in some jurisdictions. See, e.g., State v. Malkin, 722 P.2d 943 (Alaska 1986). However, most jurisdictions adhere to the position set forth in Franks that intentional and reckless falsehoods have an identical effect and do not provide grounds for voiding the warrant unless, after their deletion, the warrant does not establish probable cause. 2 W. LA FAVE, supra, § 4.4, at 199. As La Fave notes, this rule makes it unnecessary for trial judges to make the "difficult finding of whether a particular misrepresentation was intentional instead of reckless." Id.

from discovering further evidence. We cannot conclude, therefore, that the trial judge committed clear error or abused her discretion in making this finding. Cf. State v. Claxton, 122 Ariz. 246, 248, 594 P.2d 112, 114 (Ct. App. 1979) (officer's statement in the affidavit that defendant was in possession of merchandise was found to be "knowingly and intentionally false" or "made with reckless disregard for the truth" where officer admitted at hearing that there was, at best, "only a possibility that jewelry was back in [defendant's] possession").

We conclude that the trial judge was correct in following the first prong of Franks and redrafting the search warrant affidavit to exclude the material misstatements and include the

relevant omitted facts. We must now determine whether the redrafted search warrant was sufficient to establish probable cause.[7]

3. The Probable Cause Issue

The court of appeals apparently reviewed the trial court's probable cause determination under an abuse of discretion standard. Buccini, 165 Ariz. at 110, 796 P.2d at 912. Although this court has never expressly considered this issue, we believe that de novo review is the proper standard to review a trial court's finding as to whether a redrafted search warrant affidavit is sufficient to establish probable cause. See, e.g., Elliott, 893 F.2d at 222;

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[7] The search warrant affidavit, redrafted in strict accordance with the trial judge's factual findings, is set forth in Appendix C to this opinion.

Dozier, 844 F.2d at 705; United States v. Grandstaff, 813 F.2d 1353, 1355 (9th Cir.), cert. denied sub nom Brown v. United States, 484 U.S. 837, 108 S.Ct. 119 (1987); see also McConney, 728 F.2d at 1203 (noting that the United States Supreme Court has held that the mixed question of probable cause is treated as a question of law and reviewed de novo).

Although in most instances a magistrate's finding that sufficient probable cause exists to issue a search warrant will not be overturned unless it is clearly erroneous, this rule does not apply when a trial court reviews an affidavit that was submitted to the magistrate and later found to have been supported by false statements. Elliott, 893 F.2d at 222. Under these circumstances, the trial court must

undertake an independent review of the effect of the false statements on probable cause because "the question turns on the consequences of a fraud on the issuing magistrate which that magistrate was not in a position to evaluate." Id. Because the magistrate's discretion was vitiated by fraud, the question turns on the legal effect of the correct facts. De novo review of the trial court's finding as to the existence of probable cause is therefore appropriate. Id.

Moreover, as the McConney court noted, de novo review is proper when a mixed question of law and fact implicates constitutional rights. 728 F.2d at 1203. Clearly, when we are required to apply the legal standard for probable cause, we must go beyond the

facts of the case and consider the "abstract legal principles that inform constitutional jurisprudence." Id. Other state courts follow the rule of de novo review as well. See, e.g., State v. Rubio, 771 P.2d 537 (Idaho App.), rev. denied, 788 P.2d 1332 (Idaho 1989); People v. Caserta, 463 N.E.2d 190 (Ill. App. 1984); see also People v. Loewen, 196 Cal. Rptr. 846, 850, 672 P.2d 436, 440 (1983) (whether search was "reasonable" within the meaning of the constitution is a question of law, and appellate court must exercise its independent judgment, measuring the facts, as found by the trier, against the constitutional standard of reasonableness).

4. Application of the Probable Cause Standard

In undertaking de novo review of the probable cause determination under the redrafted affidavit, we must apply the standard articulated by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983). Under Gates, probable cause exists if "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238, 103 S.Ct. at 2332. In Carter, we applied the Gates standard using the following test:

> An officer has probable cause to conduct a search if a reasonably prudent person, based upon the facts known to the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they

> would be found at the place to be searched.

145 Ariz. at 110, 700 P.2d at 497 (citations omitted).

The redrafted affidavit indicates that Kadous knew the following facts at the time he applied for the search warrant: first, Moore, the victim of the bombing, had been involved in a minor traffic accident with Buccini several weeks before the bombing; second, a note reading "drop it" was found on the victim's vehicle; third, Buccini could account for his whereabouts on the night in question and had named several witnesses who could verify his presence at the bar and at his parents' residence before, during, and after the bombing, which occurred at

11:56 p.m.;[8] and finally, Buccini apparently had lawfully experimented with explosives and had gunpowder and fuse in his home.

In this case, the property to be seized constituted items that could be used to make an explosive device. Buccini never denied that he worked in an ammunition supply store and that he kept such items in connection with his reloading hobby. We have no quarrel, then with the court of appeals' statement that there was probable cause to believe that such items would be found in the search. Buccini, 165 Ariz.

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[8] The dissent speculates that the alibi was not airtight. Infra at 26-27. From the facts known to Officer Kadous, however, the alibi was complete. It certainly might have been disproved by police investigation, but supplying misinformation to the magistrate does not qualify as investigation.

at 110, 796 P.2d at 912. However, justification for a search requires more. The inquiry is not whether these items could be found in Buccini's house; the critical question is whether such items were connected with the particular criminal activity of which he was suspected.[9] Gates, 462 U.S. at 2388, 103 S.Ct. at 2322; Carter, 145 Ariz. at 110, 700 P.2d at 497. Any other result would justify search of any premises connected with the use, distribution, or sale of guns or explosive materials. The items to be seized were not

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[9] The dissent infers that there was reason to believe material would be found in Buccini's home that might be used for illegal activities. Infra at 27-28. The point is irrelevant. The affidavit submitted by Officer Kadous sought a warrant to search for evidence of a particular bombing, not for evidence of other illegal activities, such as the manufacture of firecrackers. Cf. infra at 27-28.

contraband, nor are the materials or equipment in question "inherently criminal." Thus, the strength of the inference that the items were connected with criminal activity depends upon the strength of the evidence indicating that Buccini was responsible for the bombing.

The affidavit recounts the fact that Buccini and Moore were involved in a traffic accident. There was no evidence that the encounter was hostile or that Buccini later evinced any threatening behavior toward Moore. Further, there was no evidence that the note reading "drop it" was tied in any way to Buccini. It is not alleged in the affidavit or otherwise that Moore or his insurer had instituted any type of proceedings against Buccini or that Buccini was aware of any threat to do

so. Thus, the phrase "drop it" seems to have little relevance when related to an incident that occurred weeks earlier. In short, the affidavit does not show that, so far as Buccini knew, Moore had anything to "drop."

The facts relating to Buccini's alibi, then, were critical to the probable cause determination. If Buccini had a firm alibi for the time of the bombing, there would be no basis to believe that the items in his home were connected to the bombing, and therefore no probable cause. Absent facts indicating that the alibi was untrue, we cannot say that a reasonably prudent person would be justified in concluding that the items sought were connected with criminal activity. To the contrary, the officer's deliberate or

reckless omission and misstatement of material facts indicates that he was acting mainly upon a suspicion or hunch that Buccini was responsible for the bombing. An officer's mere suspicion that a search will reveal items connected to criminal activity is not sufficient to establish probable cause. United States v. Kandlis, 432 F.2d 132 (9th Cir. 1970); State v. Hutton, 110 Ariz. 339, 341, 519 P.2d 38, 40 (1974). To the contrary, as the United States Supreme Court pointed out in Johnson v. United States:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often

> competitive enterprise of ferreting out crime.

333 U.S. 10, 13-14, 68 S.Ct. 367, 369 (1948).

We conclude, therefore, that the redrafted affidavit does not provide probable cause to support the issuance of the warrant. The redrafted affidavit fails to show probable cause connecting Buccini or Buccini's home with the crime. While it shows that he possessed property of the type that might be connected with the crime, it also shows that this possession is explained and is not refuted by any facts cited in the affidavit. Further, the redrafted affidavit shows an alibi for the crime, and, again, the affidavit provides no facts indicating the alibi to be untrue or possibly untrue.

Because the materiality of false statements or omissions is reviewed de novo, we need not accord any special deference to the trial judge's findings in this regard. See Grandstaff, 813 F.2d at 1355. However, in this case, given the importance of the alibi to the probable cause determination, we are compelled to agree with the trial judge's conclusion that had Kadous truthfully revealed the fact that Buccini had an alibi and witnesses, the magistrate would have been prompted to inquire whether Kadous had attempted to verify the alibi. Thus, the omission was material in that it rendered the affidavit "substantially misleading" and was also necessary to the finding of probable cause. See People v. Aston, 216 Cal. Rptr. 771, 780, 703 P.2d 111,

120 (1985) (citing People v. Kurland, 68 Cal. Rptr. 667, 618 P.2d 213 (1980)) (omissions are material where there is a "substantial possibility" that the omitted facts would have altered a reasonable magistrate's probable cause determination.[10]

We realize that probable cause is a somewhat "fluid concept" that turns on "the assessment of probabilities in

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[10] Cf. People v. McDaniel, 127 Cal. Rptr. 467, 478, 545 P.2d 843, 854 (in a bombing case, affidavit found to support probable cause determination under search warrant for defendant's car where it included the following facts: defendant was identified as being at the trailer which was later bombed; defendant was overheard speaking of his ability and inclination to use explosives for criminal purposes; defendant's car was seen in the immediate vicinity of the explosion; defendant told officers after his arrest that he was experienced in the use of explosives and that there might be some explosives in his car), cert. denied, 429 U.S. 847, 97 S.Ct. 131 (1976).

particular factual contexts." Gates, 462 U.S. at 232, 103 S.Ct. at 2329. We also agree that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. . . ." United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 3416 (1984). However, even if this were a close case on the probable cause finding, policy considerations militate in favor of resolving this probable cause determination in the defendant's favor.

The rule in non-Franks cases considers the general presumption of validity of a search warrant and the deference given to a magistrate's determination of probable cause in concluding that in a "doubtful or marginal case a search under a warrant

may be sustainable where without one it would fail." See 2 W. LA FAVE, SEARCH & SEIZURE §4.4 at 199 (2d ed. 1987) (quoting United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965)). The same rule, however, does not apply to a Franks case. To the contrary:

> [W]hen it has been established that the earlier finding of probable cause was based upon a broader set of "facts," some of which are now shown to be false, there is no longer any reason to give deference to that earlier finding. Thus, when a court reassesses a search warrant affidavit with the false allegations excised, a "doubtful or marginal case" should be resolved in the defendant's favor. That is, in such circumstances the probable cause determination should be made as it would upon a motion to suppress evidence obtained without a warrant.

Id.

The policy underlying Franks seeks to mitigate the dangers of the ex parte procedure used to obtain a search

warrant, and to deter over-zealous officers from supplying false information in their efforts to obtain access to the constitutionally protected privacy of one's home or car. See Franks, 438 U.S. at 168-169, 98 S.Ct. at 2682-83. We firmly adhere to these policies and believe that where the officer has deliberately or recklessly made material misstatements and omissions in the original affidavit, it is appropriate to resolve marginal probable cause determinations in such a manner as well best uphold the integrity of the fourth amendment.

CONCLUSION

We hold that an appellate court must use a dual standard to review a search warrant redrafted after a Franks hearing. The factual determinations of

the trial judge as to the officer's knowing, intentional, or reckless misstatements or omissions must be reviewed under a "clearly erroneous" standard. Under that standard, the trial court did not err in its implicit finding that the affidavit was, at least, recklessly false.

The legal determination of probable cause, however, must be reviewed de novo. In this case, we do not find that the redrafted affidavit was sufficient to support probable cause for the issuance of a search warrant. Therefore, we vacate the court of appeals' opinion and affirm the trial

court's order suppressing the evidence obtained under the search warrant.

STANLEY G. FELDMAN, Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES MOELLER, Justice

CAMERON, Justice, specially concurring:

The term probable cause has been troublesome since the beginning of our republic. Chief Justice John Marshall in 1813 stated:

> [T]he term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion.

Locke v. United States, 7 Cranch 339, 3 L.Ed. 364 (1813).

Others have tried to bring some harmony into the meaning stressing that:

> [There is a] difference between what [evidence] is required to prove guilt in a criminal case and what [evidence] is required to show probable cause for arrest or search. . . . There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.
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> * * *
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> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Brinegar v. United States, 338 U.S. 160, 173, 175 (1949).

> To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. It is enough if the apparent facts which have come to

> his attention are sufficient in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched.

Husty v. United States, 282 U.S. 694, 700-01 (1931)(citations omitted).

> Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing the offense has been committed.

Henry v. United States, 361 U.S. 98, 102 (1959)(citations omitted).

> [P]robable cause ... is [a] reasonable ground of probability supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused guilty. "Probable cause" or "reason to believe", therefore, is like a third-quarter percentile; it is more information than would justify the officer saying, "From all the circumstances I suspect this man", but it need not be such information as would justify the officer in saying, "From all the circumstances I know this is the man".

Monroe v. Pape, 221 F. Supp. 635, 642-43 (1963)(citations omitted).

Probable cause is more than mere suspicion. Facts that would cause the officer to investigate the matter further differ from facts that support a finding of probable cause. In this case, absent the false statements, the affidavit supported only a mere suspicion of defendant's connection to the pipe bomb.

Defendant's actions when questioned became important. His cooperation with the authorities is a point in his favor, though not conclusive. The inference in the affidavit, that the defendant did not cooperate and wanted to avoid the police, might, if true, provide the magistrate with the missing link to warrant a prudent man to rationally

believe that there was probable cause to issue the warrant.

Because the defendant had the capacity to make a pipe bomb, a capacity he no doubt shared with others in the community, does not mean he made the bomb in question. The officer should have proceeded to investigate the matter to the point that he either found probable cause or excluded defendant as a suspect. The officer's good faith belief that defendant made the bomb is not enough. Probable cause exists when the facts and circumstances known to the officer were such that a reasonable person could believe defendant committed the crime, or was in possession of evidence that would connect defendant to the crime. Henry, 361 U.S. at 102. Furthermore, I note that when an

affidavit is knowingly false in part, it tends to infect the whole affidavit and makes the state's burden more difficult.

I would affirm the decision of the trial court.

JAMES DUKE CAMERON, Justice

CORCORAN, Justice, dissenting:

I respectfully dissent because, even when the affidavit is redrafted to exclude the false information and take into account the omitted "alibi," sufficient evidence exists to support a reasonable finding of probable cause.

Under the Gates test, probable cause exists if a reasonable person would conclude "that the items sought are connected with criminal activity and that they would be found at the place to be searched." State v. Carter, 145

Ariz. 101, 110, 700 P.2d 488, 497 (1985). The majority admits probable cause to believe that the seized items would be found in the search, but refuses to acknowledge that the items sought are connected with criminal activity because it believes (1) that Buccini's "alibi" negates any basis to think he was responsible for the bombing, and (2) that the gunpowder and fuses in question are not "inherently criminal."

Buccini's explanation of his whereabouts, however, is not an alibi. "Alibi" is a Latin term meaning "elsewhere" or "in another place." State v. Hubbard, 351 Mo. 143, 151, 171 S.W.2d 701, 706 (1943). In a criminal proceeding, "alibi" refers to a defense or plea that the defendant was at a

different place so remote or under such circumstances that he could not have committed the charged offense. Black's Law Dictionary 71 (6th ed. 1990).

At the time the investigating officer submitted the oral, telephonic affidavit requesting a search warrant, the police believed that the bomb exploded on May 8 around 12:30 a.m., about the same time that Buccini, according to the redrafted affidavit, arrived at his parents' house after leaving the Harp and Shamrock Bar. This information does not foreclose all probability of guilt, but instead suggests that Buccini had the opportunity to plant the bomb on his way to see his father and sister. The redrafted affidavit simply confirms the investigating officer's beliefs

expressed in the original affidavit; Buccini was in fact "out around at night at the time of the bombing" and "did not have any other" witnesses who could account for his actions from the time he left the bar, which is located near the victim's residence, until he reached his parents' house. The majority cannot assume, therefore, that the magistrate would have altered his ruling had the police recounted Buccini's story in more detail.

A reasonable person could have also concluded at the time the search warrant was issued that at least some of the items seized in the consent search were illegally possessed, and therefore connected with illegal activities. The process of reloading ammunition does not require cannon or safety fuse. Such

fuse is purchased and used with one purpose in mind--triggering explosive devices. The manufacturing and possession of small fireworks, not to mention the more powerful bleach/mothball charges and grenade simulators described in the redrafted affidavit, are strictly regulated under Arizona statutes. See A.R.S. §§36-1601 to-1608 (prohibiting the sale, use, or possession of any fireworks); §§13-3101 to-3104 (prohibiting the making and possession of "prohibited weapon[s]," including explosives, bombs, grenades, or a combination of materials designed or intended for use in making or converting a device into a prohibited weapon). Buccini does not claim an authorized or permitted use under municipal, state, or federal laws. See

§§36-1605, 13-3102(C)(3). In short, we are not dealing with a gun-owner who simply reloads ammunition for a hobby. Rather, we have, at the very least, an explosives enthusiast who not only collects demolition paraphernalia, but enjoys improvising and setting off illegal bombs.

By dissenting, I do not condone any police officer's attempt to sway a magistrate's probable cause determination with false statements or material omissions. At this juncture, however, the propriety of the officer's conduct is immaterial. When the court finds, as in this case, that an affiant knowingly, intentionally, or recklessly included a false statement or omitted relevant facts, the issue becomes whether the false or omitted information

was necessary to the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676 (1978).

Here the omitted "alibi" information and the statement that Buccini appeared "in a hurry" during the consent search were not necessary to the magistrate's ruling. As the court of appeals correctly reasoned, "[t]he bombing, the note left on the victim's vehicle, and the victim's prior encounter with Buccini, together with the powder and fuses found during the consent search, were alone sufficient to support the issuance of the warrant." State v. Buccini, 165 Ariz. 108, 110, 796 P.2d 910, 9912 (App. 1990) (emphasis added). I believe we should reserve for a more appropriate case the issue of whether the police should verify an

alleged alibi before seeking a search warrant.

ROBERT J. CORCORAN, Justice

APPENDIX A

SEARCH WARRANT AFFIDAVIT

On May 8th at 0030 hours a pipe bomb was placed int he garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victims' vehicle. Also attached to the car window as a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at his residence. He invited me in and I interviewed him regarding this incident. He stated that he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident. He also stated that he was out around at night at the time of the bombing and did not do it but did not have any other

people to provide an alibi where he was at. I asked him if he would sign a consent to search form which he did at 1230 hours.

During the search I found gun powder, safety fuse and green cannon fuse which was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he received some military paraphernalias [sic] and explosives from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in which he was found in possession of military ordinance [sic] and explosives. Those were also confiscated. While searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to work at 1400 hours. The search was concluded and the items aforementioned were seized. A complete search was not done of the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

APPENDIX B

TRIAL COURT'S ORDER

THE COURT FINDS that the statement in the affidavit that the defendant "did not have any other people to provide an alibi where he was at." is false. THE COURT FURTHER FINDS that the affidavit should have included the information that the officer had at the time which was that defendant had stated he was at the "Harp and Shamrock Bar" during part of the time in question and that he had listed alibi witnesses including Dwayne Nanna, among others. Furthermore, the officer should have listed that the defendant had, at approximately 12:30, gone to his parents' home and that his father and sister had noted his presence in the residence at that time.

THE COURT FURTHER FINDS that with the deletion of the false statement and the inclusion of the alibi statements, that the Judge would have been prompted to inquire further of the police officer as to his investigative efforts with regard to verifying the presence of the defendant with the alibi witnesses.

THE COURT FURTHER FINDS that the inclusion of the implication that the defendant was rushing the police officer in his search was incorrect. Rather, the officer should have included a statement that the defendant was, in fact, cooperating with the officer throughout the voluntary search, and that it was the officer who concluded

the search based on his own knowledge that the defendant had to go to work that day.

Accordingly, THE COURT FINDS the remaining affidavit is insufficient to show probable cause and

IT IS ORDERED suppressing all fruits of the illegal search.

Minute Entry, March 29, 1989.

APPENDIX C

REDRAFTED SEARCH WARRANT AFFIDAVIT

On May 8 at 0030 hours a pipe bomb was placed in the garage of a Howard Moore on 9086 E. Holmes. The device was detonated causing damage to the garage and the victim's vehicle. Also attached to the car window was a note which stated to "drop it." An interview with Mr. Moore revealed that on March 31, 1988 he was involved in an accident with a Richard Buccini. Buccini insisted on paying for the damage so that he would not lose his job as a chauffeur-driver for Canyon Ranch Resort. Police were called anyway and a report was made. On May 12, this day, at 1130 hours I made contact with Richard Buccini at his residence. He invited me in and I interviewed him regarding this incident. He stated that he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident

that occurred a week after the March 31 accident. ~~He also stated that he was out around at night at the time of the bombing and did not do it but did not have any other people to provide an alibi where he was at.~~ He stated that he was at the Harp and Shamrock Bar on the night of the bombing, and named witnesses who could verify this, including Dwayne Nanna, among others. He also stated that he went to his parents' home at approximately 12:30 and that his father and sister had noted his presence in the residence at that time. I asked him if he would sign a consent to search form which he did at 1230 hours.

During the search I found gun powder, safety fuse and green cannon fuse which was consistent with the fuse used on the explosive device found at the garage area. While searching he stated that he got the items such as the cannon fuse to make an improvised explosive device using bleach and mothballs which he had learned in a publication and with a friend of his at Canyon Ranch. He also stated that he received some military paraphernalia and explosives from a Carl Weisel who last year the Tucson Police Department in conjunction with the FBI conducted an investigation in which he was found in possession of military ordnance and explosives. Those were also confiscated. ~~While searching the residence Mr. Buccini was definitely in a hurry and was inferring that I leave the residence so that he could go to~~

~~work at 1400 hours. The search was concluded and the items aforementioned were seized.~~ Buccini was cooperative throughout the search. I concluded the search because I knew that Buccini had to go to work at 1400 hours. The aforementioned items were seized. A complete search was not done on the residence or the vehicle. It is believed that the evidence may be concealed or destroyed if not searched immediately.

(3)

NO. 90-1926

Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

RICHARD JOSEPH BUCCINI,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Attorney General of
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Question Presented

After determining that there were material omissions in the affidavit for the search warrant under Franks v. Delaware, did the Arizona Supreme Court correctly determine that, under the fourth amendment, the state was required to investigate all possible leads and witnesses prior to seeking a search warrant, and that the failure to affirmatively show this investigative evidence in the affidavit rendered the warrant lacking in probable cause?

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STATEMENT OF THE CASE

Buccini's brief in opposition reads like a closing argument to the jury. Not even the trial court in this case accused the affiant of purposely lying to mislead the magistrate. Petition at A-50. The state has not and will not suggest that the affidavit was well drafted. However, it does not matter at this point whether the officer lied to the magistrate or not. The redrafted affidavit contains probable cause to search. The only way the majority of the Arizona Supreme Court could have concluded otherwise was to have accepted the defendant's testimony about his alibi defense as true and castigate the police officer for not proving or disproving this defense before he sought the warrant. That is not what a reviewing court is supposed to be doing under the Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) line of cases. The Arizona

Supreme Court is ill-suited to be directing police investigations.

Buccini's brief keeps repeating the mistaken notion that a police officer is supposed to finish his investigation completely before he seeks a search warrant. Buccini says: "...the officer could have compiled the requisite probable cause if he simply would have completed his investigation." Brief in Opposition at 9, 22. This Court's cases do not stand for that proposition. On its face, such an idea is ludicrous. The detective gave the reason at the hearing:

> It is my experience in dealing with this individual and talking with him for the length of time I did, and presenting what I had in the case, and him knowing that and him telling me he was going to leave the residence, that he was going to work, I felt he was going to take the stuff with him or somehow destroy it before I got back.

(R.T. of Feb. 27, 1989, at 46.) The police officer's job is not to prepare the defense case for trial. See Arizona

v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

This "airtight" alibi, as Buccini calls it in his brief, has never been supported by anything other than his own testimony. The Arizona courts never heard from his allegedly disinterested witnesses either by way of affidavit or live testimony. The list of alibi witnesses that Buccini gives in his brief were unknown to the officer. When Buccini asked about those people, the detective testified: "Sam and Dwayne Nanna were mentioned. Those were the only 2 people mentioned." (Id. at 26.) The detective gave a straightforward reason for not naming them in the affidavit:

> At the time of this affidavit, I thought the explosion occurred at 12:30. After interviewing the Defendant, he gave me 2 statements, one of which was he left the bar sometime between 12:00 and 12:30, and the other one was he went home from 12:15 to 12:30.

> That told me that if an explosion happened at 12:30, and the statements that he made, he wouldn't have been with anybody. He said he wasn't at the bar between 12:00 and 12:30.

(Id. at 47.)

There is even more in the record to support the officer's credibility. The state has not dwelled on that because that is not the legal issue in the case. The issue is whether the reviewing court properly redrafted the affidavit. In other words, can Franks v. Delaware be read to require the police to chase down every lead in the case before they seek a search warrant? The incomplete investigation theory is the only reason the majority on Arizona's highest court gave for not finding probable cause. Why should it matter what was left out of the affidavit if, as the lower appellate court and the dissent found, there was enough good, undisputed information in the affidavit to provide probable cause?

Buccini tries to draw attention away from this issue by also calling the state a liar. At page 26 he says the state has made unfounded assertions about his possession of the same kind of fuse as that used in the bomb and about illegally possessed military explosives. Both of those statements about the fuse and the military explosives appear in the affidavit even after it was redrafted by the Arizona Supreme Court. Petition at A-53. Likewise, contrary to Buccini's assertion at page 25 of the brief in opposition, the motive or grudge against the victim is plainly stated in the redrafted affidavit. Buccini was involved in a traffic accident with the victim and Buccini "insisted on paying for the damage so that he would not lose his job as a chauffer-driver for Canyon Ranch Resort. Police were called anyway [by the victim] and a report was made." Petition at A-52. "He [Buccini] stated

he was on probation at Canyon Ranch Resort where he works because of the accident he was involved in as well as another vehicle accident that occurred a week after the March 31 accident." (Id.) Buccini never disputed those facts in the trial court. He cannot call them false at this juncture. Those facts look like a motive. They look like a motive that fits the "drop it" note placed on the victim's windshield. Buccini also had opportunity. From his own statement, it is obvious that he was out drinking and that he was in the area around the time the bomb exploded. As pointed out by the dissent, even under the redrafted affidavit, Buccini could have planted the bomb while driving from the bar to his parents' house. Petition at A-44. These facts together with the fact that Buccini was a self-admitted experimental explosives enthusiast who possessed some of the same materials used in the

exploded pipe bomb should lead a reasonable person to believe that evidence of the crime could be found in Buccini's residence or vehicle. The Arizona Supreme Court has wrongly interpreted Franks v. Delaware to require that the officer interview a list of potential defense witnesses before seeking that warrant. This Court should accept this case and hold that potentially exculpatory leads or witnesses need not be investigated prior to the state's seeking a warrant.

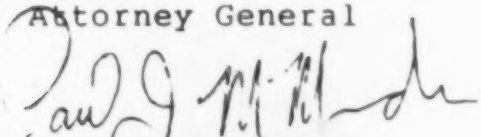
CONCLUSION

This Court should accept this case and hold that potentially exculpatory leads or witnesses need not be investigated prior to the state's seeking a warrant.

DATED this 6th day of August, 1991.

Respectfully submitted,

GRANT WOODS
Attorney General



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CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 2nd day of August, 1991, to:

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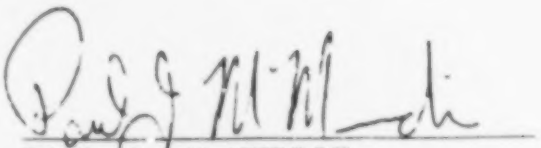

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